Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

E. B. Rood and
R. Bruce McLaughlin, *Petitioners,*

v.

The City of Oldsmar, a Florida
Municipal Corporation, *Respondent.*

On Petition for a Writ of Certiorari to the
District Court of Appeal
of the Second District of Florida

PETITION FOR A WRIT OF CERTIORARI

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Petitioners, *Pro Se*

3 02 PP

QUESTION PRESENTED FOR REVIEW

1. Whether the District Court of Appeal failed to follow the mandate found in the Fifth and Fourteenth Amendments to the Constitution of the United States when it reinstated a Declaratory Judgment action seeking a declaration that Comprehensive Plan designations were arbitrary and capricious, without reinstating a companion action for damages?

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The City of Oldsmar, a Florida
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On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

E. B. Rood and R. Bruce McLaughlin respectfully petition for a writ of certiorari to review

the judgment of the District Court of Appeal for the Second District of Florida entered in this proceeding on April 9, 1996, (Appendix at A-6 - A-13) and for which rehearing was denied on May 9, 1996. (Appendix at A-4 - A-5)

OPINIONS BELOW

The opinion of the Second District Court of Appeal of the Second District of Florida is reported at 21 Fla.L.W. D903. (Appendix at A-6 - A-13) The Order denying Petitioners' Motion for Rehearing (Appendix at A-4 - A-5) is unpublished. The Orders of the Circuit Court of the Sixth Judicial Circuit Dismissing this Action (Appendix at A-14 - A-30) are also unpublished.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(1). The District Court of Appeal for the Second District of Florida entered its judgment on April 12, 1996 and denied a motion for rehearing on May 9, 1996. Pursuant to Article V, § 3(b) of the Constitution of the State of Florida, the

decision of the District Court of Appeal is a final decision from the highest court of the state with jurisdiction over this matter. On July 26, 1996 Justice Kennedy extended the time for the filing of this Petition until September 4, 1996. (Appendix at A-1 - A-2.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "... nor shall any person be ... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV

The Fourteenth Amendment provides in pertinent part: "... nor shall any State deprive any person of

life, liberty, or property, without due process of law, ..."

42 U.S.C. § 1983

42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of state law ... subjects, or causes to be subjected, any citizen ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, ..." 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Rood and McLaughlin (by McLaughlin's predecessor,) owned adjacent parcels of land totalling approximately 135 acres within the City of Oldsmar. At all times material hereto, the lands of Rood and McLaughlin were zoned General Commercial and Residential Planned Development at 7.5 units per acre.

However, under the City's Comprehensive

Plan, Rood's property was solely in a Medium Density Residential designation and McLaughlin's property was solely in an Open Space designation. Under Florida law, the Comprehensive Plan designation takes precedence over a Zoning Ordinance [1] and Rood and McLaughlin's predecessor were prohibited by the City from using their land in accordance with its zoning.

In 1988, Rood and McLaughlin's predecessor reached agreement with the City for changes to the City's Comprehensive Plan that permitted a reasonable form [2] of development for their properties. Rood, McLaughlin's predecessor, and the City then entered into a Development Agreement

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1 See, generally, *Brown v. Pinellas County*, 420 So.2d 308 (Fla. 2d DCA 1982), and *Pinellas County v. Ashley*, 464 So.2d 176 (Fla. 2d DCA 1985) and § 163.3194(1)(b), Florida Statutes.

2 The City argued, and the Trial Court agreed, that the 1988 Development Agreement stated that the previous Comprehensive Plan designations were reasonable and appropriate. However the same agreement stated that the previous Zoning Districts were also reasonable and appropriate. Since the Zoning Districts conflicted with the Comprehensive Plan designation, there is clearly a conflict within the Agreement, which required a trial on the merits.

pursuant to § 163.3220, Florida Statutes, to reflect and implement their agreement. However, the implementation of the Development Agreement with the City was foreclosed by actions of Pinellas County. [3]

Subsequently Rood renegotiated the Development Agreement with the City, but the renegotiated Development Agreement was foreclosed by the foreclosure of a Mechanic's Lien filed by McLaughlin. Thereafter, the parties attempted to resolve their differences and enter a further amendment to the Development Agreement but, at all times material hereto, were unable to do so.

Rood, from at least 1988 to 1996, and McLaughlin from May, 1992, until February, 1996, were subjected to the arbitrary and capricious Comprehensive Plan designations on their properties, which designations took **all** beneficial use of McLaughlin's property and deprived Rood of his reasonable investment-backed expectations. In particular, the open space designation on McLaughlin's property permitted no land uses other

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[3] See *Rood v, Pinellas County*, table opinion at 15 F.3d 1096 (11th Circuit, 1994), and Case No. 93-1798 before this Court.

than open uses which were effectively dedicated to a public purpose, without compensation.

PROCEEDINGS BELOW

When they were unable to reach further agreement with the City, Rood and McLaughlin filed suit against the City of Oldsmar seeking a Declaratory Judgment with respect to certain aspects of the Development Agreement and damages with respect to, *inter alia*, the imposition of the Comprehensive Plan designations on their properties. (Appendix at A-31, *et.seq.*, A-80, Count IV {Third Amended Complaint}; A-103, Count IX. {Third Amended Complaint}, and A-151, Count III {Fourth Amended Complaint}) [4]

The City repeatedly sought and achieved dismissals of the complaint based on the alleged

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[4] Certain counts were dismissed with prejudice from the Third Amended Complaint and other counts were dismissed from the Fourth Amended Complaint. Because the arbitrary and capricious damage count was dismissed with prejudice in the Third Amended Complaint (Appendix at A-103, Count IX,) the Third Amended Complaint is included in the Appendix.

non-compliance of Rood and McLaughlin with Florida's Rules of Civil Procedure. (*e.g.* Appendix at A-8, *et.seq.*). [5] The Circuit Court finally dismissed the entire action with prejudice (Appendix at A-25, A-30) and Rood and McLaughlin filed a timely appeal to Florida's Second District Court of Appeal.

The Second District Court of Appeal reinstated four counts of the final complaint, three seeking various Declaratory Judgments and one seeking damages for slander of title. Although the Court of Appeal reinstated (Appendix at A-12,) the count

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[5] Such dismissals were clearly inconsistent with Federal Constitutional law:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim **unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.** [Emphasis added; footnote omitted] *Conley v. Gibson*, 355 U.S. 41, (1957).

However, this Petition for Writ of Certiorari focusses only on the key issue of damages to compensate for the arbitrary and capricious Comprehensive Plan designations.

seeking a Declaratory Judgment that the Comprehensive Plan designations applied to the property of Rood and McLaughlin were arbitrary and capricious, (Appendix at A-151, Count III, Fourth Amended Complaint) the Court refused to reinstate the companion count seeking damages for the time in which the arbitrary and capricious Comprehensive Plan designations were in place. (Appendix at A-12, A-103, Count IX, Third Amended Complaint) This Petition ensued.

REASONS WHY CERTIORARI SHOULD BE GRANTED

In addition to the obvious desirability of correcting the error below, there is a compelling reason why certiorari should be granted in this case.

This Court has held that actions under 42 U.S.C. § 1983 may be brought in state court. [6] However, the ability of a Plaintiff to seek redress in State Court under 42 U.S.C. § 1983

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[6] *Howlett v. Rose*, 496 U.S. 356, (1990). *Howlett* also came to this Court from Florida's Second District Court of Appeal.

will be meaningless if the State Courts refuse to permit damage actions, even where they find a valid cause of action for declaratory and injunctive relief arising from the same cause of action.

JUST COMPENSATION

Rood and McLaughlin seek **both** a Declaratory Judgment that the Comprehensive Plan designations applicable to their properties were arbitrary and capricious and damages for the temporary taking of their properties while those designations were in place. The District Court of Appeal has permitted Rood and McLaughlin to prosecute a Declaratory Judgment action seeking a declaration that the Comprehensive Plan designations applicable to their properties were arbitrary and capricious, (Appendix at A-12,) but has refused to reinstate the companion damage case, (Appendix at A-12) in direct contravention of the mandate of this Court. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, (1987) this Court held:

> "... We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.*

Petitioners seek nothing more than for the State Courts to enforce the duty of the City to provide Rood and McLaughlin with compensation for the period in which their property was taken by the City's arbitrary and capricious Comprehensive Plan designations.

More recently in *Lucas v. South Carolina Coastal Commission*, 502 U.S. 966 (1992), the Court held:

> "... When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." [Footnote omitted] *Id.* at 2901.

In the instant case, the District Court of Appeal has permitted a determination of whether the regulation at issue "declares 'off-limits' all economically ... beneficial uses of [Petitioners'] land", but has refused to permit Petitioners to obtain the compensation necessary to sustain the regulation.

In *Eide v. Sarasota County*, 908 So.2d 716 (11th Cir. 1990), the Eleventh Circuit identified the four types of takings claims which can be litigated. With respect to the arbitrary and capricious takings claim at issue herein, the Court held:

> "... a plaintiff may argue that a regulation is arbitrary and capricious, does not bear a substantial relation to public health, safety, morals or general welfare, and is therefore an invalid exercise of the police power. *See Nectow v. City of Cambridge*, 277 U.S. 183, 236, [*sic*] 48 S.Ct. 447, 448 , 72 L.Ed. 842 (1928); *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989); *Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir. [1980]), *cert. denied* 449 U.S. 886, 101 S.Ct. 240, 66

L.Ed.2d 112 (1980); *but see Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986 (en banc) (zoning is quasi-legislative action, and, therefore, zoning decisions need only have conceivable rational basis), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566, 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986). We will refer to such a claim as an 'arbitrary and capricious due process' claim. [9] ... To prove an arbitrary and capricious due process claim, a plaintiff need only prove that the government has acted arbitrarily and capriciously. [Footnote omitted] Such a challenge may be either a facial or an as applied challenge. ... In the case of an as applied challenge, the remedy is an injunction preventing the unconstitutional application of the regulation to plaintiff's property and/or damages resulting from the unconstitutional application. ..."

> [9] Most courts have referred to this type of claim as a substantive due process claim. ..." *Eide* at 721-22.

Thus, the *Eide* Court properly followed the mandate of this Court in identifying the remedy for arbitrary and capricious land use regulations: injunctive relief and damages as appropriate.

In *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973, 102 S.Ct. 2236; affirmed, 746 F.2d 1437 (11th Cir. 1984); 833 F.2d 267 (11th Cir. 1987); and 896 F.2d 1347 (11th Cir. 1990), a property owner had a legitimate permit to build an apartment complex, pursuant to the then existing Zoning Code. In response to an outcry by neighboring property owners, the City passed a new Zoning Ordinance which effectively revoked the Building Permit. The Circuit Court held:

> "The district court held that the implementation of city Ordinance no. 216 was arbitrary and capricious, and was specifically intended to prevent the plaintiffs from exercising their building

permit. As applied to plaintiffs, Ordinance no. 216 was found to be a confiscatory measure and violative of the plaintiffs' fourteenth amendment rights to due process. Further, the ordinance bore no substantial relationship to legitimate concerns for health, safety, welfare, or the general well-being of the community. We agree." *Wheeler I*, 664 F.2d at 100.

"The issue of liability is settled in this case. In *Wheeler I* a panel of the former Fifth Circuit held that the City of Pleasant Grove had engaged in a taking when it applied Ordinance No. 216 against the plaintiffs. In *Wheeler II* we held that a necessary implication of the *Wheeler I* holding was that the plaintiffs were entitled to compensation for the injury they sustained as a result of the temporary taking." *Wheeler III*, 833 F.2d at 270.

When the United States District Court continued to refuse to properly award damages, an obviously frustrated panel of the Eleventh Circuit (*Wheeler IV*, 896 F.2d at 1349) actually calculated the damages due to the property owner, (*Id.* at 1352). Therefore, it is clear, that when a local government acts in a fashion that is arbitrary and capricious, and not rationally related to the legitimate exercise of the police power, the result is to be an award of damages to the affected property owner.

The District Court has permitted Rood and McLaughlin to avail themselves of the first part of the remedy identified in *Eide, supra*, with a Declaratory Judgment action, but has denied them the ability to avail themselves of the second part of the remedy - damages for their losses which were proximately caused by the City of Oldsmar's unconstitutional action.

There are numerous federal judicial declarations of when a taking occurs:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state

interests ..." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

"... Given ... the importance of zoning as an instrument of community control over private property, this Court has decided that the proper standard of review of zoning ordinances is limited to the question 'whether the action ... is arbitrary and capricious, having no substantial relation to the general welfare.'..." *Stansberry v. Holmes*, 613 F.2d 1285 (5th Cir. 1980).

"Our en banc opinion in *South Gwinnett Venture [v Pruitt*, 491 F.2d 5 (5th Cir.] explicitly holds that 'The *only* question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare.' 491 F.2d at 7." [Emphasis by the Court]

Couf v. DeBlaker, 652 F.2d 587, 590 (5th Cir. 1981).

Other Circuits have also recognized the need for damages for the arbitrary and capricious land use actions by local governments:

> "Accordingly we find that the city council's decision to arbitrarily withhold Bateson's building permit 'may fairly be said to represent official policy,' and acted as the 'moving force' behind Bateson's constitutional injury. Consequently, the City ... and the individual city council members, are liable for Bateson's constitutional injury." *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) at 1304.

The situation in which Rood and McLaughlin find themselves falls squarely within the foregoing analyses of compensable takings, and mere invalidation of the Comprehensive Plan designations is an insufficient remedy.

This Court has ruled, *First English, Lucas,*

supra, that when an unconstitutional taking occurs, as a matter of fact, then, as a matter of law, pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States, compensation must follow. By permitting Rood and McLaughlin to prosecute their Declaratory Judgment action, but not the companion damage complaint, the lower courts departed from established precedent of this Court, and certiorari should be granted to achieve consistency between this Court's rulings and those below.

CONCLUSION

This case presents an important issue of public policy and federal law - whether the State Courts, which clearly have jurisdiction over actions brought pursuant to 42 U.S.C. § 1983 - must follow the Constitutional mandate found in the Fifth and Fourteenth Amendments, to permit damage actions to enforce Declaratory Judgments in land use and zoning matters.

Therefore, certiorari should be granted to ensure that State Courts clearly understand that

damages are an integral part of Constitutional land use jurisprudence, and this issue should be decided on the merits.

Respectfully submitted,

/s/ E. B. Rood
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Counsel of Record, *pro se.*

/s/ R. Bruce McLaughlin
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No. _____

IN THE

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OCTOBER TERM, 1996

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v.
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On Petition for a Writ of Certiorari to the
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APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
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WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

July 26, 1996

Mr. R. Bruce McLaughlin
900 Gulf Boulevard
No. 303
Indian Rocks Beach, FL 34635

Re: E. B. Rood And R. Bruce McLaughlin
v. City of Oldsmar
Application No. A-60

Dear Mr. McLaughlin:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on July 26, 1996, extended the time to and including September 4, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

/s/

Sandra Elliott Spagnolo
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

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William A. Haddad
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IN THE SECOND DISTRICT COURT
OF APPEAL, LAKELAND, FLORIDA

MAY 9, 1996

E. B. ROOD and R. BRUCE MCLAUGHLIN,	)	
Appellant(s),	)	
V.	)	Case No. 94-02479
THE CITY OF OLDSMAR, et al.,	)	
Appellee(s).	)	

BY ORDER OF THE COURT:

Appellee's motion to strike appellants motion for clarification is hereby deniedc. [*sic*].

Appellant's motion for clarification and reconsideration is hereby denied.

The joint motion for clarification is also denied. The reason this court specified the counts it was reinstating in each amended complaint was so that there would be no confusion as to exactly the 4 counts being reinstated.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: E. B. Rood, Esq.
R. Bruce McLaughlin
Bryan A. Kutchins, Esq.
Thomas J. Trask, Esq.
/PM

SEAL

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

E. B. ROOD and R. BRUCE MCLAUGHLIN,	)	
Appellant(s),	)	
V.	)	Case No. 94-02479
THE CITY OF OLDSMAR,	)	
Appellee(s).	)	

Opinion filed April 12, 1996

Appeal from the Circuit
Court for Pinellas County;
Richard A. Luce, Judge.

E. B. Rood, Pro Se Appellant.

R. Bruce McLaughlin, Pro So
Appellant.

Bryan A. Kutchins of Kutchins,
Bishop & Schultz, P.A., Oldsmar,
for Appellee.

CAMPBELL, Judge.

Appellants. E. B. Rood and R. Bruce McLaughlin, challenge the dismissal with prejudice of certain counts of their third amended complaint and the dismissal with prejudice of their entire fourth amended complaint. We affirm in part and reverse in part.

Appellants Road and McLaughlin own adjacent parcels of land in Oldsmar. Appellants' actions against appellee, the city of Oldsmar (Oldsmar), arise out of appellants' unsuccessful

attempts to develop their properties in accord with Oldsmar's and other governmental entities' regulations. Since this appeal may be disposed of on procedural grounds, we need not relate the rather complicated facts set forth by appellants in their attempt to allege a cause of action against Oldsmar.

When appellants were unable to develop the property as they desired, they filed their original complaint consisting of nine counts against Oldsmar and other individual defendants who are not parties to nor affected by this appeal. An amended complaint was then filed in response to defensive Motions by two of the individual defendants. The amended complaint again consisted of nine counts contained in 168 numbered paragraphs and thirty-eight pages. Oldsmar filed a motion to dismiss all nine counts of the amended complaint on February 19, 1993. The initial trial judge, based on a stipulation of the parties, dismissed with prejudice Counts IV, V, and IX of the amended complaint. The trial judge also, an the basis of Oldsmar's motion to dismiss, dismissed Counts I, II, III, VI, VII and VIII with leave to file a second amended complaint.

Appellants, on March 16, 1993, filed a

narrative-type, second amended complaint containing eleven counts in 261 numbered paragraphs and fifty-five pages. Thereafter, on August 9, 1993, the initial trial judge specifically found that Counts I, III, V and XI of the second amended complaint adequately stated causes of action against Oldsmar. That order also dismissed with leave to amend, according to specific directions by the trial judge, Counts II, IV, VI, VII, VIII, IX and X.

Appellants, on August 27, 1993, filed a third amended narrative-type complaint, this time consisting of twelve counts contained in 298 separately-numbered paragraphs and sixty-three pages. Counts I, III, IV and XII of the third amended complaint alleged the same causes of action as Counts I, III, V and XI of the second amended complaint. A newly assigned trial judge again denied Oldsmar's motion to dismiss those counts.

Oldsmar's motion to dismiss Counts III, V, VII, VIII, IX, X and XI of the third amended complaint was granted, and those counts were dismissed with prejudice. Count VI of the third amended complaint was dismissed without prejudice, and appellants were again granted leave to amend consistent with directions by the trial judge.

Moreover, the trial judge ordered appellants to replead in a fourth amended complaint "in compliance with Rule 1,110," those counts previously found to allege a valid cause of action.

On July 19, 1994, appellants filed their fourth amended complaint which contained seven counts in 155 separately-numbered paragraphs and thirty-six pages. Counts I II, III and VI of this fourth amended complaint alleged the same causes of action as Counts I, III, V and XI of the second amended complaint and Counts I, II, IV and XII of the third amended complaint, which had previously been held to adequately state valid causes of action. The second trial judge, on the basis of Oldsmar's motion to dismiss, entered an order that dismissed with prejudice appellants' entire fourth amended complaint. In doing so, the judge found as follows:

> This Court, by Order dated June 17, 1994, granted part of the City of Oldsmar's Motion to Dismiss the Third Amended Complaint and directed Plaintiffs to comply with Rule 1.110(b), Fla.R.Civ.P., in filing a

> Fourth Amended Complaint. In defiance of this Court's Order, the Plaintiffs' Fourth Amended Complaint not only fails to comply with Rule 1.110(b), but has repled counts which were dismissed by the Court with prejudice in the June 17, 1994 Order. Moreover, the Plaintiffs, amended complaint has raised new causes of action without leave of court. Based upon the Plaintiffs' continued noncompliance or disregard with the Orders of this Court, the court finds involuntary dismissal of this action is warranted.

While we are not unmindful of the trial Judge's justifiable frustration at the failure of appellants to more properly plead in accordance with the Rules of Civil Procedure, we conclude that dismissal with prejudice is too severe a sanction in regard to those counts of appellants' complaint that twice previously were found to adequately state valid

causes of action. Appellants were both pro se. While appellant Rood is a lawyer previously admitted to practice law in Florida, appellant McLaughlin is not educated in the law. Our supreme court in *Wilson v. Lee Memorial Hospital* 65 So.2d 40, 41, (Fla. 1953), held in this regard as follows:

> It is well to require the complaint to state a cause of action, but that done, it should never be overthrown by technical impediments that do not go to the merits of the cause. Whether the technical impediment be a rule or statute is not material. It is certain that the makers of the Constitution did not intend that one injured in "lands, goods, person or reputation" be deprived of a right of action.

We, therefore, reverse the dismissal with prejudice of Counts I, II, III and VI of appellants' fourth amended complaint (Counts I, III, V and XI

of the second amended complaint and Counts I, II, IV and XIII of the third amended complaint). We otherwise affirm the dismissal of appellants' fourth amended complaint.

Affirmed in part, reversed in part and remanded.

DANAHY, A.C.J., AND SCHOONOVER, JJ. Concur

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

E. B. ROOD, and R. BRUCE McLAUGHLIN,

Plaintiffs,

vs.

Case No. 92-3764-CI-07

THE CITY OLDSMAR, a Florida municipal corporation, THOMAS PINTA and NICK STASZKO, in their individual and personal capacities, and ERIC AGER,

Defendants.

_____/

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS THIRD AMENDED COMPLAINT

THIS CAUSE having come before the Court

upon the Defendant City of Oldsmar's ("Oldsmar") motion to Dismiss the Plaintiffs' Third Amended Complaint, with prejudice, and the Court having heard the arguments of the Plaintiffs, pro se and of counsel for the Defendant, and having reviewed the aforementioned motion along with the memoranda of law and supporting authority submitted to the Court, and being otherwise fully advised in the premises, finds as follows:

1. In ruling an the instant motion, the Court recognizes that "[tlhe purpose of a motion to dismiss is to ascertain whether a plaintiff has alleged a good cause of action and the court must confine itself strictly to the four corners of the complaint." *N.E. at West Palm Beach, Inc. v. Morowitz*, 471 So.2d 570, 570-72 (Fla. 3rd DCA 1985). "It is appropriate to consider defendants' affirmative defenses, or the sufficiency of the evidence which the plaintiff is likely to produce." *Id.* at 571.

2. Previously, by Order dated August 6, 1993, this Court found that the Plaintiffs had adequately stated a cause of action with regard to Counts I, II, IV and XII (Counts I, III, V and XI of the second Amended complaint). Accordingly, this Court shall deny Defendant's motion to dismiss these counts.

3. Count III of the Third Amended Complaint fails to state a cause of action for equitable relief based upon the original Development Agreement executed by the parties. Specifically, Count III contains four (4) fatal repugnancies, one of which was disallowed by this Court's previous February, 1993 Order, and yet again, for a second time, by this Court's August 6, 1993, Order.

As was previously observed by this Court in its earlier Order Granting Motion to Dismiss Amended Complaint, and this Court's August 6, 1993, Order, Count III (Count IV of the Second Amended Complaint) "demonstrates an impermissible inconsistency between the allegations contained therein and the written terms of the Development Agreement." The impermissible inconsistency between the allegations contained in the Third Amended complaint and the written terms of the Development Agreement not only remain, but are further amplified. In the Plaintiffs' Third Amended Complaint they have, for the first time, included the site plan exhibit which was originally attached to the 1988 Development Agreement. By including the missing exhibit to the 1988 contract the irrevocable nature of the fatal repugnancy is

augmented. In particular, the inclusion of the Site Plan Exhibit to the 1988 Development Agreement reveals a proposed collector road running through the project. Nowhere is there any reference to the Site Plan Exhibit to Duane Avenue. The Site Plan makes no reference whatsoever to Duane Avenue. It only refers to a generic and unnamed road, not even designated as a collector road, running through the Site Plan.

The Plaintiffs' repeated disregard of this Court's previous two orders alone require dismissal with prejudice, notwithstanding the three (3) further repugnancies contained in Count III of the Third Amended Complaint.

This aside, the repugnancy between complaint and exhibit negates the cause of action and requires dismissal. See *Franz Tractor Co. v. J.I. Case Co.*, 566 So.2d 524 (Fla. 2nd DCA 1990), in which the court held:

> Any exhibit attached to a pleading is a part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the

> document will control and may be the basis of a motion to dismiss. *Id.* at 526.

The First District Court of Appeal held likewise in *Striton Properties v. The City of Jacksonville Beach*, 533 So.2d 1174 (FI. lst DCA 1988).

Since there is no provision in the 1988 Development Agreement, nor its exhibits, which requires as a condition precedent the designation of Duane Avenue as a collector road, Plaintiffs have failed to state a cause of action for termination of the 1988 Development Agreement as set out in Count III and its companion Count VIII of the Third Amended Complaint.

In addition, a further impermissible inconsistency between the allegations contained in the Third Amended Complaint and the written terms of the Development Agreement exists in the present pleadings. The 1986 Development Agreement, at paragraph 6, provides for the automatic termination if "the land use designation . . . contemplated by this agreement [are not] placed on the property." The complaint then alleges that Duane Avenue was not

designated as a collector road. A review of the 1990 Contract reveals that the term "property" is defined in the contract to mean only the property owned by E. B. Rood and Keith R. Collen (and now Collen's successor, Bruce McLaughlin). Because Duane Avenue is not Plaintiffs, property, and because the termination provisions of the Development Agreement apply only to Plaintiffs' property, the refusal to designate Duane Avenue as a collector road by Pinellas County cannot trigger the termination provisions of the Development Agreement. In addition to the reasons set forth earlier, based upon this repugnancy, Count III and VIII are dismissed With prejudice.

4. Count V and Count X of the Third Amended Complaint are barred by the statute of limitations. Section 95.11(3)(p), Florida Statutes, requires that "[a]ny action not specifically provided for in these statutes" must be commenced within four (4) years. The complaint reveals that the ordinance under attack was adopted over 13 years ago, in December 1980. Accordingly, Counts V and X of the Third Amended complaint are time-barred and must be dismissed with prejudice.

5. Count VI of the Third Amended Complaint

(like Count VI of the second Amended Complaint) fails to state a Cause of action for rescission. Previously, this Court, in its August 6, 1993, Order dismissed Count VI of the Second Amended Complaint and provided Plaintiffs an opportunity to amend to state a cause of action. Despite Plaintiffs' continued failure to state a cause of action, the Court shall provide Plaintiffs an additional opportunity In which to do so. Accordingly, the Court shall grant the Defendant's motion to dismiss Count VI of the Third Amended Complaint but without prejudice.

6. As this Court ruled in its August 6, 1993, Order of Dismissal, the Plaintiffs' counts for duress (Counts II and VII of the Second Amended Complaint) failed to plead sufficient allegations of ultimate fact to show duress. As noted by the Court, to support such a claim, "it must be shown: (a) that the act sought to be set aside was affected involuntarily and thus not as an exercise of free choice or will and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side." *City of Miami v. Kory*, 394 So.2d 494, 497 (Fla. 3rd DCA 1981), *rev, denied*, 407 So.2d 1104 (Fla. 1981). Inasmuch as the allegations for duress contained in the Plaintiffs'

Second Amended Complaint (Count II and VII), remain virtually unchanged in the Plaintiffs' Third Amended Complaint (Count VII), with the exception of additional conclusions, assumptions and speculative statements of fact, this Court's prior determination shall not change.

Based upon the reason set forth above, and the Court otherwise finding merit in Defendant's remaining arguments that Count VII warrants dismissal, Count VII of the Third Amended C Complaint shall be dismissed with prejudice.

7. As with many of the Plaintiffs' other counts, the Court finds Count IX of the Third Amended Complaint (as it did with Count IX of the Second Amended Complaint) fails to state a cause of action due to a repugnancy existing between the pleadings and the attached exhibits. Therefore, Count IX shall be dismissed with prejudice.

By the execution of the 1988 Development Agreement (Exhibit G), the Plaintiffs stipulated that

> The current land use plan and zoning districts are reasonable and appropriate for application to the property upon fulfillment of the Owners'

> obligations under this Development Agreement.

The Plaintiffs also concede that the Comprehensive Plan designations that they now challenge applied to the 1988 Contract. This means that the "current land use plan and zoning districts" approved by the Plaintiffs in the 1986 Development Agreement are precisely those attacked by plaintiffs in their complaint.

Further, Plaintiffs acquired the land with actual or constructive notice of the land's Comprehensive Plan designations. As stated by the Third District Court of Appeal in *Namon v. State Department of Environmental Regulation*, 558 So.2d 504 (Fla. 3rd DCA 1990), *rev. denied*, 564 So.2d 1086 (Fla. 1990):

> Appellants are deemed to purchase the property with constructive knowledge of the applicable land use regulations. *Id.* at 505.

Under the authorities cited above, and even assuming that the Comprehensive Plan designations

worked a taking, the existence of the designations prior to the Plaintiffs' purchase of the land precludes the Plaintiffs from stating a cause of action.

Finally, by the execution of the 1988 Development Agreement and of the 1990 Amendment thereto the Plaintiffs became bound by the statute that requires development agreements to be consistent with the City's Comprehensive Plan:

> Consistency with the comprehensive plan and land development regulations. -- A development agreement and authorized development shall be consistent with the local government's comprehensive plan and land development regulations. Section 163.3231, Florida Statutes (1987).

Plaintiffs' execution of the development agreement bound them to this statute both by operation of this statute and by operation of the common-law rule that "the law existing at the time and place of making a contract forms part of the contract as if it had been incorporated into it."

Franz Tractor Co. v. J.I. Case Co., 566 So.2d 524, 526 (Fla. 2nd DCA 1990).

Likewise, all purchasers of land take with constructive notice of all applicable laws, such as the statute requiring development consistent with the City's Comprehensive Plan. *Namon.*

For the foregoing reasons, Plaintiffs are precluded from stating a taking cause of action. Accordingly, Count IX shall dismissed with prejudice.

8. As this Court found in its August 6, 1993, order, the present Count XI of the Third Amended Complaint (Count X of the Second Amended Complaint) fails to state a cause of action for delay pursuant to 42 U.S.C., Section 1983, in that a proper basis for this court's jurisdiction over such a cause of notion has not been properly alleged. Based upon the Plaintiffs, failure to replead this count in compliance with this Court's previous Order, and the Court once again finding that Count XI fails to state a cause of action, the Court shall dismiss this count, with prejudice.

9. On the whole, the court finds the Plaintiffs, complaint inordinately long, complicated and replete with legal conclusion, assumptions and speculative

statements of fact. Moreover, the complaint is replete with contradictions, repugnancies and redundancies while containing textbook phrases of zoning with broad allusions to law that are on the whole deficient. The Court recognizes that courts encourage parties to replead and replead unless to do so would be contrary to the ends of justice. Here, the Court finds it would not be contrary to the ends of justice. In fact, justice demands that the Plaintiffs, in their Fourth Amended Complaint, replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The Defendant's Motion to Dismiss Counts I, II, IV and XII of the Third Amended Complaint are [*sic*] hereby DENIED.

2. The Defendant's Motion to Dismiss Counts III, V, VII, VIII, IX, X and XI of the Third Amended Complaint are [*sic*] hereby GRANTED and those Counts Are DISMISSED with prejudice.

3. The Defendant's Motion to Dismiss Count VI of the Third Amended complaint is hereby GRANTED without prejudice. The Plaintiffs shall have twenty (20) days within which to file a Fourth Amended Complaint consistent with this Court's findings above. Moreover, the Plaintiffs' Fourth Amended Complaint shall replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this ___ day of June, 1994.

RICHARD A. LUCE
Circuit Judge

cc: Bryan A. Kutchins, Esquire
E. B. Rood
R. Bruce McLaughlin
Eric Ager

ORIGINAL SIGNED

June 17 1994

RICHARD A. LUCE
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

E. B. ROOD, and R. BRUCE McLAUGHLIN,

Plaintiffs,

vs.

Case No. 92-3764-CI-07

THE CITY OLDSMAR, a Florida municipal corporation, THOMAS PINTA and NICK STASZKO, in their individual and personal capacities, and ERIC AGER,

Defendants.

_____/

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE RESPONSIVE PLEADINGS AND MOTION FOR INVOLUNTARY DISMISSAL

THIS CAUSE having come before the Court

on the Defendant's, City Of Oldsmar's, Motion for Involuntary Dismissal pursuant to Rule 1.420(b), Fla.R.Civ.P., Continued Motion to Extend Time for Responsive Pleadings to Plaintiff's Fourth Amended Complaint and Motion to Strike Counts IV, VII and VIII of Plaintiff's Fourth Amended Complaint, and the Court having considered same as well as the memoranda and argument of counsel, finds that:

This Court, by Order dated June 17, 1994, granted part of the City of Oldsmar's Motion to Dismiss the Third Amended Complaint and directed Plaintiffs to comply with Rule 1.110(b), Fla.R.Civ.P., in filing a Fourth Amended Complaint. In defiance of this Court's order, the Plaintiffs' Fourth Amended Complaint not only fails to comply with Rule 1.110(b), but has repled counts which were dismissed by the Court with prejudice in the June 17, 1994 Order. Moreover, the Plaintiffs' amended complaint has raised new causes of action without leave of court. Based upon the Plaintiffs' continued noncompliance or disregard with the Orders of this Court, the Court finds involuntary dismissal of this action is warranted.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The Defendant's Continued Motion to Extend Time for Responsive Pleadings to Plaintiff to Fourth Amended Complaint is hereby GRANTED.

2. The Defendant's Notion for Involuntary Dismissal is hereby GRANTED and the above-styled cause is hereby DISMISSED with prejudice. The remaining motion is moot.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this ____ day of October, 1994.

RICHARD A. LUCE
Circuit Judge

cc: Bryan A. Kutchins, Esquire
E. B. Rood
R. Bruce McLaughlin
Eric Ager

ORIGINAL SIGNED

OCT 19 1994

RICHARD A. LUCE
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA, CIVIL DIVISION

E. B. ROOD and R. BRUCE McLAUGHLIN,
Plaintiffs

v. Case No. 92-92-3764 CI 16

THE CITY OF OLDSMAR, a Florida Municipal Corporation, THOMAS PINTA and NICK STASZKO, in their individual and personal capacities, and ERIC AGER
Defendants

_____/

THIRD AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, FOR RECISION OF CONTRACT,

AND FOR DAMAGES

DEMAND FOR A JURY TRIAL

Plaintiffs E. B. ROOD (hereinafter "ROOD") and R. BRUCE McLAUGHLIN (hereinafter "McLAUGHLIN") sue Defendants the CITY OF OLDSMAR (hereinafter "OLDSMAR"), THOMAS PINTA (hereinafter "PINTA"), NICK STASZKO (hereinafter "STASZKO"), and ERIC AGER (hereinafter "AGER"), and for their Complaint allege as follows:

A. INTRODUCTION

I. JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to § 26.012(2)(a), Florida Statutes. This is, in part, an action for damages in excess of $15,000, exclusive of interest, costs and attorneys' fees.

2. The jurisdiction of this Court is invoked pursuant to § 86.011, Florida Statutes, which authorizes Circuit Courts to enter declaratory judgments within their monetary jurisdictional limits.

3. The jurisdiction of this Court is also invoked pursuant to § 26.012 (3), F.S., which authorizes Circuit Courts to issue injunctions. This equitable remedy, is the normal companion remedy to a Declaratory Judgment and is sought for the

purpose of enforcing the Declaratory Judgments sought herein.

4. The jurisdiction of this Court is also invoked pursuant the Fifth and Fourteenth Amendments to the Constitution of the United States, to 42 U.S.C. § 1983, and to 28 U.S.C. §1343(a)(3).

5. This Court has concurrent jurisdiction with the United States District Court under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 pursuant to *Howlett v. Rose*, 110 S.Ct. 2430 (1990).

6. This is a cause of action arising under the Fifth and Fourteenth Amendments to the Constitution of the United States as enforced through 42 U.S.C. § 1983. Plaintiffs allege that Defendants, acting under color of state law, deprived Plaintiffs of rights, privileges and immunities guaranteed by the Constitution of the United States. This Court has jurisdiction over actions under 42 U.S.C. § 1983 as set out in ¶¶ 4 and 5, *supra.*

7. With respect to Part B, *infra*, Declaratory Judgment against Ager, and with respect to Part C, *infra*, Declaratory and Injunctive Relief against OLDSMAR, Plaintiffs assert that their positions espoused in this Complaint are legally

sound and supported by fact and law. The Defendants' actions, however, have created a *bona fide* controversy between the parties. Plaintiffs require, therefore, a declaratory judgment declaring their rights, privileges and immunities.

8. In particular, McLAUGHLIN not being a party to any of the preceding transactions with OLDSMAR, requires a Declaratory Judgment setting forth his rights, obligations and privileges related to:

a) The governing law re. the payment of sewage impact fees;

b) The status of the Original Development Agreement and the Amended Development Agreement which OLDSMAR alleges apply to McLAUGHLIN's real property;

c) The validity and applicability of the Future Land Use Element of the City of OLDSMAR Comprehensive Plan, as it existed in 1982, to McLAUGHLIN's real property.

9. With respect to Part B, *infra*, Declaratory Judgment against Ager, and with respect

to Part C, *infra*, Declaratory and Injunctive Relief against OLDSMAR, Plaintiffs have no adequate remedy at law.

10. With respect to Part C, *infra*, Declaratory and Injunctive Relief against OLDSMAR, Plaintiffs, will suffer irreparable harm if Defendants are allowed to continue their conduct sought to be enjoined herein.

II. THE PARTIES

11. Plaintiff, E. B. ROOD is the owner of that certain parcel of real property located within the corporate limits of Defendant, the CITY OF OLDSMAR and more particularly described on Exhibit A, attached hereto and made a part hereof by reference. ROOD has been the owner of said property at all material times.

12. Plaintiff McLAUGHLIN is the owner of that certain parcel of real property located within the corporate limits of Defendant, the CITY OF OLDSMAR and more particularly described on Exhibit B, attached hereto and made a part hereof by reference. McLAUGHLIN is the successor by foreclosure to KEITH R. COLLEN (hereinafter "COLLEN").

13. Defendant, OLDSMAR is a Florida Municipal Corporation.

14. All actions of Defendant OLDSMAR complained of herein were actions under color of state law, and were official policy, custom and usage of OLDSMAR in violation of immunities, rights and privileges guaranteed to Plaintiffs by the Constitution and Laws of the United States and of the State of Florida.

15. The actions of Defendant OLDSMAR were further a part of a pattern of misconduct as demonstrated in this Complaint and by the actions of Defendant towards other Developers, which pattern of misconduct is the official policy and custom of the City. This pattern, custom and usage further has deprived, and is continuing to deprive, Plaintiffs of Constitutionally protected rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

16. The pattern of misconduct, official policy, custom and usage of Defendant OLDSMAR was the direct and proximate cause of the damages suffered by Plaintiffs as set out *infra*.

17. Defendant PINTA was at all material times a member of the City Council of the CITY OF

OLDSMAR and is sued in his individual and personal capacities.

18. Defendant STASZKO was at all material times the Planning Director of the CITY OF OLDSMAR and is sued in his individual and personal capacities

19. Defendant AGER is a Consultant to ROOD and COLLEN who asserts a claim against ROOD and COLLEN related to issues herein.

20. Pursuant to the requirements of § 86.091, Florida Statutes, a copy of this Third Amended Complaint is also being served on the Honorable Bernie McCabe, State Attorney, Sixth Judicial Circuit, 5100 144th Avenue North, Clearwater, Fl., 34620, who is entitled to be heard in this matter.

III. GENERAL ALLEGATIONS

III.A. HISTORICAL BACKGROUND

21. ROOD purchased his property, (comprising approximately 100 acres) in 1982.

22. McLAUGHLIN's predecessor in title, COLLEN, purchased his property, (comprising approximately 35 acres), in 1982.

23. McLAUGHLIN acquired COLLEN's

former property through the foreclosure of a mechanic's lien recorded in the Public Records of Pinellas County, Florida.

24. Previously, COLLEN had attempted to sell his property to ROOD by means of a deed executed on October 17, 1990 and recorded on August 15, 1991 in Official Records Book 7653, Page 274, Public Records of Pinellas County, Florida.

25. However, the transaction from COLLEN to ROOD was barred by McLAUGHLIN's Notice of *Lis Pendens*, recorded on March 8, 1990 in Official Records Book 7219, Page 304, Public Records of Pinellas County, Florida.

26. Accordingly, McLAUGHLIN has good and marketable title to the property described on Exhibit B.

27. At the time of ROOD's purchase of the property described on Exhibit A, said property was zoned C-2, General Commercial (approximately 15 acres along the S.R. 584 frontage) and R.P.D. 7.5, Residential Planned Development, 7.5 units per acre (approximately 85 acres in the South part of the property).

28. At the time of ROOD's purchase of the

property described on Exhibit A, said property was designated Urban Low Density Residential in the purported OLDSMAR Comprehensive Plan.

29. At the time of COLLEN's purchase of the property described on Exhibit B, said property was zoned C-2, General Commercial (approximately 8 acres along the S.R. 584 frontage) and R.P.D. 7.5, Residential Planned Development, 7.5 units per acre (approximately 27 acres in the South part of the property).

30. At the time of COLLEN's purchase of the property described on Exhibit B, said property was designated Open Space in the purported OLDSMAR Comprehensive Plan.

31. When McLAUGHLIN first obtained a judgment against COLLEN, and had the Pinellas County Sheriff levy against COLLEN's property to satisfy that judgment, John Pinta, son of Defendant THOMAS PINTA, appeared at the Sheriff's sale with the announced intention of bidding for the property. However, McLAUGHLIN elected to postpone the sale and no bids were taken.

32. When McLAUGHLIN secured a judgment on his Mechanic's Lien, and foreclosed said lien, John Pinta, son of Defendant THOMAS

PINTA, appeared at the Clerk's sale and bid for the property.

33. In the latter part of the negotiations with OLDSMAR, beginning in approximately June, 1990, (and just after McLAUGHLIN commenced his action against COLLEN,) Defendant PINTA, as a Member of the City Council, became intransigent as to ROOD's development proposals and led the City in obstructing and delaying the reasonable development of Plaintiffs' property.

III.B. DEVELOPMENT OVERTURES

34. Beginning in 1985, ROOD attempted to develop his property in accordance with the OLDSMAR Zoning Ordinance.

35. In particular, ROOD made application to OLDSMAR for the issuance of site development approvals and Building Permits for a Shopping Center of approximately 150,000 square feet to be located on the 15 acres of ROOD's property zoned C-2.

36. ROOD's application for site development approval and Building Permits was denied by OLDSMAR because the proposed use was inconsistent with the Comprehensive Plan

designation of Urban Low Density Residential.

37. Contemporaneously with ROOD's applications to OLDSMAR, McLAUGHLIN's predecessor COLLEN also made enquiries of the City with respect to the development of his property in accordance with OLDSMAR's Zoning Ordinance.

38. After ROOD's applications for approval of the proposed Shopping Center were denied by OLDSMAR, ROOD retained McLAUGHLIN to determine if an amendment to the OLDSMAR Comprehensive Plan could be obtained.

III.C. THE COMPREHENSIVE PLAN DESIGNATIONS

39. Until December 16, 1980, OLDSMAR had no Comprehensive Plan.

40. However, On October 10, 1972 OLDSMAR adopted its Zoning Ordinance which placed the ROOD and COLLEN/McLAUGHLIN properties in the C-2 and R.P.D. 7.5 Zoning Districts.

41. In December, 1980, in an effort to comply with the mandates of Chapter 163, Florida Statutes, 1979, OLDSMAR purportedly adopted its Comprehensive Plan.

42. The actual *OLDSMAR Comprehensive* Plan (and its Future Land Use Element) were not attached to Ordinance 80-12 which purportedly adopted the Comprehensive Plan.

43. The Future Land Use Map of the OLDSMAR Comprehensive Plan, at least with respect to Plaintiffs' properties, was copied verbatim from the Comprehensive Land Use Plan of the Pinellas County Planning Council (P.P.C.).

44. The P.P.C. was subsequently found to have improperly adopted its Comprehensive Plan and to be an unconstitutional body.

45. The P.P.C. designations of Urban Low Density Residential on ROOD's property and Open Space on the COLLEN/McLAUGHLIN property did not take into account the adjacent arterial road, State Road (S.R.) 584, the commercial development along S.R. 584, and the industrial development to the North of the Plaintiffs' properties, across S.R. 584.

46. Accordingly, the P.P.C. Comprehensive Plan designations, adopted in the OLDSMAR Comprehensive Plan, along the frontage of the ROOD and COLLEN/ McLAUGHLIN properties were arbitrary and capricious, not rationally related to the legitimate exercise of the police power, and

worked a taking of all economically beneficial use of the property. The designations also destroyed the reasonable, investment-backed expectations of ROOD, COLLEN and McLAUGHLIN.

47. The Open Space designation on the COLLEN/McLAUGHLIN prohibited all economically beneficial use of all the property, was arbitrary and capricious, not rationally related to the legitimate exercise of the police power, and worked a taking of all beneficial use of the property. The designation also destroyed the owners' reasonable, investment-backed expectations.

48. In contrast to the invalid, unconstitutional, arbitrary and capricious designations of the P.P.C. Comprehensive Plan, mimicked by the OLDSMAR Comprehensive Plan, the Zoning Districts (C-2 and R.P.D. 7.5) established by the OLDSMAR Zoning Ordinance were carefully and precisely established, in response to the particular circumstances of the sites, and were appropriate for the land.

III.D. THE SEWAGE CAPACITY SALE

49. At the time ROOD was making his application to OLDSMAR for approval of the

proposed Shopping Center, OLDSMAR had a significant shortage of capacity in its Sewage Treatment Plant, and had no funds available to cure said shortage.

50. At that time, connections to the OLDSMAR sewage system, and sewer impact fees were governed by OLDSMAR **Ordinance** 85-37, Exhibit C, attached hereto and made a part hereof by reference.

51. On May 20, 1986, OLDSMAR adopted **Resolution** 86-14, (Exhibit D, attached hereto and made a part hereof by reference,) establishing a method by which sewage capacity would be sold, sewer impact fees pre-paid, and funding for an expansion to the Sewage Treatment Plant thereby obtained.

52. Thereafter, after objecting to the Sewage Capacity Sale (*e.g.*, Exhibit E, attached hereto and made a part hereof by reference) and continuing his efforts to develop his property in accordance with the OLDSMAR Zoning Ordinance, ROOD, under duress, paid to OLDSMAR the sum of $715,000 in accordance with the requirements of Resolution 86-14.

53. ROOD's duress had as its direct and

proximate cause, the following unlawful actions of Defendant OLDSMAR:

a) The imposition of the designations of an unlawful and arbitrary and capricious Comprehensive Plan designation on ROOD's real property;

b) The unlawful rejection of ROOD's development proposals based on the unlawful Comprehensive Plan; and

c) The unlawful amendment by Defendant OLDSMAR of Ordinance 85-37 by Resolution 86-14;

as a result of which ROOD acted involuntarily and was unable to exercise his free choice or will, all as a direct result of the improper and coercive actions of Defendant OLDSMAR.

54. Therefore, ROOD was not a free agent when he entered into the alleged contract (Exhibit F, attached hereto and made a part hereof by reference).

55. ROOD's payment to OLDSMAR was made pursuant to a contract, (Exhibit F,) purportedly authorized by Resolution 86-14.

56. The sum of $715,000 was calculated for ROOD by McLAUGHLIN and others, based on the sewage generated by development in accordance with the Zoning Ordinance.

57. In the sale of sewage capacity, OLDSMAR hoped to sell all (except for a reservation for "small projects", not applicable to ROOD or McLAUGHLIN's properties) of the capacity of the proposed expansion of the Sewage Treatment Plant which, if the sale of all capacity had occurred, would have prevented any major development in OLDSMAR, except by those who had purchased sewage capacity, for the foreseeable future.

58. ROOD purchased sewage capacity because OLDSMAR had already placed so many obstacles in the path of his proposed development, that if all of the sewage capacity were sold in the sale, the additional delay in the development of his property would have destroyed all value of his property.

III.E. THE DEVELOPMENT AGREEMENT

59. After ROOD pre-purchased sewage capacity, based on his then existing Zoning Districts

of C-2 and R.P.D. 7.5, and while ROOD and COLLEN were continuing their discussions with OLDSMAR with respect to amending OLDSMAR's alleged Comprehensive Plan to make it consistent with the Zoning Ordinance, OLDSMAR, through its City Manager, Bruce Haddock (hereinafter "HADDOCK") suggested to ROOD and COLLEN that they combine their respective properties into a single development.

60. After preliminary, individual negotiations, ROOD, COLLEN and OLDSMAR agreed that combining the two properties and developing them as a single entity was worth further exploration.

61. Negotiations amongst the parties continued from the summer of 1986 until May, 1987.

62. Concurrently with these negotiations, OLDSMAR enacted Ordinance 86-41, providing for the use of Development Agreements pursuant to § 163.3220, Florida Statutes 1987.

63. Also during these negotiations, Defendant AGER offered his services to ROOD, COLLEN and McLAUGHLIN as an advisor with respect to negotiations with the members of the

OLDSMAR City Council.

64. AGER was to be compensated a reasonable amount, to be determined by the parties, if a Development Agreement were approved and consummated.

65. After extensive negotiations amongst the parties, the terms and conditions of a Development Agreement were agreed upon by the parties and ratified by the City Council on May 5, 1987. The Development Agreement is found as Exhibit G, attached hereto and made a part hereof by reference.[1]

66. The Development Agreement required ROOD and COLLEN to, *inter alia*, by way of example and not limitation:

a) construct a connector road joining Duane Avenue in unincorporated Pinellas County,

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[1] Pursuant to O.R. Book 6830, Page 913, this Exhibit is attached as it is found in the Public Records of Pinellas County, except that a small scale version of Exhibit C to the Original Development Agreement is also attached, to show the correlation between the Collector Road identified in the agreement and Duane Avenue as it presently exists. Exhibit C to the Development Agreement is the Site Plan incorporated into the Agreement, and reproduced here with annotations to distinguish the ROOD and McLAUGHLIN properties, and to establish the dimensions between Moccasin Creek and Duane Avenue. For ease of reference, Exhibit C to the Development Agreement (Exhibit G hereto,) will hereafter be referred to as the "Site Plan".

South of the railroad track forming the South boundary of ROOD's property, with S.R. 584 which forms the North boundary of ROOD's property; (See Site Plan);

b) contribute $335,000 for the construction of a water storage tank;

c) contribute $14,000 for the rehabilitation of Mapleleaf Boulevard; and

d) construct and deed to OLDSMAR an eighteen hole executive golf course.

67. The Development Agreement required OLDSMAR to, *inter alia*, by way of example and not limitation:

a) amend its Comprehensive Plan and Zoning Ordinance to permit the development contemplated by the Development Agreement;

b) apply to the Pinellas County Planning Council for approval of the land use and road

designations required to permit the contemplated development; and

c) provide water and sewer service to the development.

III.F. THE PINELLAS COUNTY PLANNING COUNCIL

68. Amongst the terms and conditions of the Development Agreement was the requirement that an amendment to the P.P.C. Comprehensive Plan be obtained to establish the designations proposed by OLDSMAR, ROOD and COLLEN.

69. On or about June 17, 1987, OLDSMAR, in accordance with the terms and conditions of the Development Agreement, applied for an Amendment to the development land use designations of the P.P.C. Comprehensive Plan, but not for the collector road land use designation required by the Development Agreement.

70. On July 15, 1987, the P.P.C. failed to approve the Comprehensive Plan Amendment requested by OLDSMAR, ROOD and COLLEN.

71. Thereafter, on August 14, 1987, OLDSMAR, ROOD and COLLEN filed a Petition

for a Writ of Certiorari in the Pinellas County Circuit Court.

72. Contemporaneous with, or prior to, the events described in ¶¶ 68 - 70, *supra*, two other Developers had sued the P.P.C., [2] alleging, *inter alia*, that the P.P.C. had failed to properly adopt its Comprehensive Plan and that the P.P.C. was an unconstitutional body.

73. The Petition for a Writ of Certiorari filed by ROOD, COLLEN and OLDSMAR was transferred to the Honorable Thomas Penick, Circuit Judge, before whom the *Brantly* and *Fourth Street Holding Company* cases were pending. The ROOD/COLLEN/OLDSMAR Petition was then abated pending the outcome of the previously filed cases.

74. Judge Penick, initially ruled, in the *Brantly* case, in September, 1987, that the P.P.C. had improperly adopted its Comprehensive Plan. Subsequently, in January and April, 1988, Judge

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[2] *City of Safety Harbor and Wilbur Brantly v. The Pinellas County Planning Council*, unpublished, Pinellas County Circuit Court Case 86-9550-15, September, 1987, amended January, 1988; *St. Petersburg Fourth Street Holding Company v. Pinellas County Planning Council*, unpublished, Pinellas County Circuit Court, April, 1988; appeals dismissed, 528 So.2d 1194 (Fla. 2d DCA, 1988).

Penick further ruled in *Brantly* that the P.P.C. as then established, was an unconstitutional body and repeated these rulings in the *Fourth Street Holding Company* case.

75. The P.P.C. then took an appeal from Judge Penick's orders.

76. During the pendency of the Appeal, the Florida Legislature adopted a new Special Act of Local Application re-establishing the P.P.C. with alleged corrections to the provisions of the original Act which were held to be unconstitutional.

77. On the new Special Act becoming law, the P.P.C. dismissed its appeal of Judge Penick's rulings, and the ROOD/ COLLEN/OLDSMAR action against the P.P.C. was also ultimately dismissed.

78. When the new P.P.C. Comprehensive Plan was adopted in accordance with the new Act, the land use of the subject property was designated in accordance with the Development Agreement between OLDSMAR, ROOD and COLLEN, except for the designation of Duane Avenue as a Collector Road in the Transportation Element of the P.P.C. Plan.

III.G. DUANE AVENUE

79. One requirement of the Development Agreement was that ROOD and COLLEN build a collector road (the Duane Avenue extension) through ROOD's property. {Exhibit G, ¶ 12(a)(1). Site Plan.}

80. Although the text of the Original Development Agreement refers primarily to a collector road, by the Site Plan it cannot be disputed that the Collector Road described by the Agreement is the existing Duane Avenue and its extension Northward through ROOD's property to S.R. 584. The Site Plan shows the collector road, to which reference is made in ¶¶ 12.(a)(1) and 12(a)(2) of Exhibit G, as being the Northerly extension of Duane Avenue, and no other interpretation of the fact that the Collector Road and Duane Avenue are one and the same is possible. [3]

81. This collector road would have joined

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[3] See also Exhibits O and P, attached hereto and made a part hereof by reference, the Executive Summary of a Planning Feasibility Study and a Transportation Analysis, respectively, both of which demonstrate conclusively that the parties intended the Collector Road to be the Northerly extension of Duane Avenue. These documents were prepared during the negotiations with
OLDSMAR, were presented in draft form to the City Council on May 5, 1987, and were refined for use at the P.P.C.

S.R. 584 to the North of subject properties with Duane Avenue, which dead ends across a railroad track adjacent to ROOD's property, and thus connect via Duane Avenue to S.R. 580.

82. A condition precedent to constructing the Duane Avenue extension as a collector road required that the road be designated as a collector in the Traffic Circulation Elements of the OLDSMAR and Pinellas County Comprehensive Plans, and on the Pinellas County Metropolitan Planning Organization (M.P.O.) Plan, the last of which is adopted as the Transportation Element of the P.P.C. Plan.

83. The M.P.O. Plan is adopted as a part of the P.P.C. Plan, (Exhibit H, attached hereto and made a part hereof by reference). Exhibit H, affirmed the previous practice of the P.P.C. described in ¶¶ 84 - 87, *infra*.

84. ROOD, through McLAUGHLIN, and OLDSMAR through its then Assistant City Manager Lou Draughon, appeared before the Pinellas County Board of County Commissioners in its Capacity as the Countywide Planning Authority when it adopted the P.P.C. Plan on January 17, 1989 to repeat the request that Duane Avenue be placed in the collector

road designation in the Transportation Element of the P.P.C. Comprehensive Plan.

85. When the Board of County Commissioners in its Capacity as the Countywide Planning Authority, refused to incorporate the collector road designation for Duane Avenue in the re-adoption of the P.P.C. Comprehensive Plan, ROOD and OLDSMAR filed a Petition and Request for Hearing with the Florida Department of Community Affairs. (Exhibit I, attached hereto and made a part hereof by reference.)

86. Said Petition, by both ROOD and OLDSMAR, in, *inter alia*, ¶ 23 (p. 5), speaks to the "designation" of Duane Avenue as a collector road.

87. Therefore, in addition to the requirement that the P.P.C. Future Land Use Plan reflect the designations established in the Development Agreement, the Agreement also required the P.P.C. Comprehensive Plan to adopt and incorporate the Duane Avenue collector designation.

88. However, on June 23, 1989, the M.P.O. refused to amend its Plan, and thus the P.P.C. Plan, to designate Duane Avenue as a collector road.

89. Thus, a designation on the P.P.C. Plan, required by the Development Agreement, has not

been obtained, thereby rendering the Development Agreement automatically terminated and therefore void.

III.H. THE DEVELOPMENT AGREEMENT STATUS

90. Paragraph 6 of the Agreement provides:

> "... In the event that the legally authorized reviews, as finally adjudicated by a Court of Law or an Administrative Hearing, by the Pinellas Planning Council, ... precludes the land use designations ... contemplated by this Agreement from being placed on the property, then this Agreement shall automatically terminate at the time of such preclusion and the parties shall cooperate to return each other to their respective positions prior to the date

of this Agreement.

91. The designation of Duane Avenue as a collector road in the P.P.C. Plan, which was a *de jure* and a *de facto* [4] condition precedent of the Development Agreement, has not been placed on ROOD's property as contemplated by the Development Agreement.

92. Accordingly, the designation of Duane Avenue as a collector road in the P.P.C. Comprehensive Plan was rejected by or on behalf of the P.P.C. on three occasions:

a) When the Board of County Commissioners refused to amend the P.P.C. Comprehensive Plan on January 31, 1989;

b) When the Florida Department of Community Affairs refused to consider the Petition of ROOD and OLDSMAR; and

c) When the M.P.O. refused to amend its Plan, as incorporated into the P.P.C. Comprehensive Plan.

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[4] See Site Plan and Exhibit G, ¶ 12(a)(1).

93. Accordingly, upon the decision of the M.P.O. (dealing with the joint P.P.C./M.P.O. Plan,) not to designate Duane Avenue as a collector road, (June 23, 1989), the Development Agreement automatically terminated and the parties were required to restore each other to their pre-agreement positions.

94. Notwithstanding the requirement of ¶ 6, that the Development Agreement automatically terminate upon the preclusion of its fulfillment by the P.P.C., ROOD and OLDSMAR sought to negotiate different solutions to the problems of the proposed development created by OLDSMAR's planning controls which existed prior to the adoption of the Development Agreement.

95. The negotiations towards a new solution to the problems posed by OLDSMAR for the development of Plaintiffs' properties involved only ROOD and OLDSMAR, and did not include COLLEN, COLLEN's attorney, or McLAUGHLIN.

96. ROOD and OLDSMAR ultimately found a new solution but were unable to secure the approval of that solution by COLLEN, see, *e.g.*, Exhibit J, attached hereto and made a part hereof by reference.

97. On March 20, 1990 OLDSMAR executed an amendment to the Development Agreement, which was executed by ROOD on May 23, 1990 (Exhibit K, attached hereto and made a part hereof by reference).

98. OLDSMAR recorded the original Development Agreement in the Public Records of Pinellas County, and, on August 9, 1991, recorded the unsigned amendment in the Pinellas County Public Records, in Official Records Book 7648, Page 1914.

99. Further, efforts to secure developers/purchasers to undertake the development of the property or to find lenders to finance such development have been unsuccessful.

100. Because Defendants, subsequent to the automatic termination of the original Development Agreement, have failed and refused to approve any plan for the economically beneficial development of Plaintiffs' property, the property has not been marketable to developers or lenders, even though ROOD has, since approximately June 1990, negotiated in good faith with Defendants OLDSMAR and STASZKO to reach agreement on an actual amendment to the Agreement that would be

marketable.

101. In the course of these efforts, ROOD has expended considerable time, money and effort.

102. Although ROOD has consistently sought to reach agreement on an actual amendment to the marketable site plan approved in the original Development Agreement, Defendants, OLDSMAR, PINTA and STASZKO, have delayed and obfuscated the process, and have failed and refused to approve workable, mutually beneficial plans that represent sound and marketable urban design, consistency with the Comprehensive Plan, and good development.

103. The actions of OLDSMAR, STASZKO and PINTA complained of herein include, by way of example and not limitation:

a) Refusal of STASZKO to allow the Florida Department of Transportation to exercise its lawful jurisdiction with respect to driveway permits on S.R. 584;

b) Rejection of the best plans for the development on, *inter alia*, the following dates:

i) August 18, 1992;

ii) February 18, 1992; and

iii) March 5, 1991.

c) Or the approval of site plans but with such numerous and onerous conditions (approximately 15 in number) that the changes required were arbitrary and capricious and therefore took all economically beneficial use of Plaintiffs' property;

d) Imposition of development requirements which made the development cost prohibitive;

e) causing enumerable, unwarranted delays in processing development plans;

f) requiring that the golf course part of the development be fully constructed and operating prior to the construction and occupancy of other parts of the development.

thereby acting arbitrarily and capriciously and taking from Plaintiffs all economically beneficial use of their property, and destroying Plaintiffs' reasonable investment-backed expectations.

104. The parties, ROOD, McLAUGHLIN, as successor to COLLEN, and OLDSMAR, have not reached agreement on amendments to the original Development Agreement and thus are bound by the original Development Agreement, which is the only agreement amongst them, but which was automatically terminated when the Pinellas County Planning Council refused to include the designation of Duane Avenue as a collector road on its Comprehensive Plan.

105. Thus, fulfillment of the terms and conditions of the original Development Agreement has been precluded by the refusal of the P.P.C. to amend its Plan to designate Duane Avenue as a collector road.

106. Further proof of the inability of the parties to fulfill the original Development Agreement is found in the execution, by OLDSMAR, of an amendment to the original agreement.

107. Therefore, the original Development Agreement is automatically terminated, and the parties are required to restore each other to their pre-agreement positions.

108. ROOD and McLAUGHLIN have declared the Development Agreement to be

terminated and have requested a refund of funds paid pursuant to the Agreement and that the parties otherwise restore each other to their pre-agreement positions. (Exhibit L, attached hereto and made a part hereof by reference.)

109. OLDSMAR has refused to refund the monies at issue to ROOD. (Exhibit M, attached hereto and made a part hereof by reference.)

110. On the completion of this action, Plaintiffs expect that this Honorable Court will declare the Original Development Agreement and the Amended Development Agreement to be null and void. Plaintiffs further expect that the Comprehensive Plan designations applicable to their properties will also be quashed, leaving a final development approval pursuant to the 1982 Zoning Districts applicable to the property.

B. DECLARATORY JUDGMENT AGAINST AGER

111. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully set out herein.

112. This is an action for Declaratory Judgment pursuant to Chapter 86, Florida Statutes.

113. Defendant AGER asserts a claim against ROOD and against McLAUGHLIN's real property for his services related to the original Development Agreement.

114. ROOD and McLAUGHLIN's predecessor, COLLEN, agreed to compensate AGER for his services if two conditions precedent were met:

a) That agreement were reached between ROOD, COLLEN and OLDSMAR; and

b) That the agreement were actually consummated by the development of the ROOD and McLAUGHLIN properties in accordance with the Agreement.

115. The first condition precedent has been fulfilled, but the second condition precedent, the consummation of the agreement, has not and cannot be fulfilled.

116. Plaintiffs herein do not challenge AGER's claims against COLLEN or AGER's claims related to services performed in the physical maintenance of COLLEN's property.

117. A dispute exists between Plaintiffs

ROOD and McLAUGHLIN and Defendant AGER with respect to the obligation, if any, of Plaintiffs to AGER.

118. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, if any, to Defendant AGER.

WHEREFORE, Plaintiffs demand judgment against Defendant AGER, as follows:

a) A judgment by the Court determining Plaintiff's obligations, if any, to Defendant AGER with respect to his services related to the original Development Agreement, and declaring that Plaintiffs ROOD and McLAUGHLIN have no obligation to Defendant AGER for services performed related to the original Development Agreement.

b) A judgment awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

C. DECLARATORY AND INJUNCTIVE RELIEF AGAINST DEFENDANT OLDSMAR

COUNT I

SEWAGE CAPACITY SALE UNLAWFUL AMENDMENT OF AN ORDINANCE

119. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully set out herein.

120. This is an action for Declaratory Relief pursuant to Chapter 86, Florida Statutes.

121. This is also an action for Injunctive Relief pursuant to § 26.012 (3), F.S.

122. Prior to the adoption of Resolution 86-14 the purchase and allocation of sewage capacity in OLDSMAR was governed by Ordinance 85-37.

123. Resolution 86-14 amended Ordinance 85-37.

124. Under Florida law, an Ordinance may not be amended except by another Ordinance. In particular, an Ordinance may not be amended by a resolution.

125. Although Resolution 86-14, on its face, alleges its consistency with Ordinance 85-37, the Resolution is, in fact, inconsistent, and is a *de facto*

and *de jure* amendment to the Ordinance in the following substantial and material ways:

a) Ordinance 85-37 provides for the payment of impact fees at times certain in the building process; Resolution 86-14 requires the payment of impact fees at 12:00 noon on June 27, 1986;

b) As an alternative to the payment of impact fees during the building process, Ordinance 85-37, itself, provides a mechanism for an advance reservation of sewage capacity, with payments made pursuant thereto being refundable; Resolution 86-14 provides that reservation fees are non-refundable;

c) Ordinance 85-37 makes no provision for the availability of water and sewer service to "small" projects; Resolution 86-14 sets aside 25% of the City's available water and sewer capacity for "small projects";

d) Ordinance 85-37 provides that sewage capacity reserved may be used anywhere in the City's sewer service area; Resolution 86-14 limits the use of reserved capacity to property precisely defined in the reservation.

126. Therefore, and notwithstanding the allegation on the face of Resolution 86-14 that it is consistent with Ordinance 85-37, the Resolution is inconsistent and actually and unlawfully amends the Ordinance, and, thus there is no repugnancy between this Complaint and Exhibit D. Therefore, Resolution 86-14 must be declared null and void.

127. A dispute exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR with respect to the validity of Resolution 86-14.

128. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, pursuant to Resolution 86-14.

129. McLAUGHLIN, not having been a party to any of the previous transactions related to Ordinance 85-37 and Resolution 86-14, is in extreme doubt about his rights, privileges, immunities and

obligations pursuant to these legislative acts of OLDSMAR.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court declaring that Defendant OLDSMAR improperly attempted to amend Ordinance 85-37 by Resolution 86-14, and that OLDSMAR Resolution 86-14 is null and void *ab initio*, and without any force or effect whatsoever;

b) Entering a prohibitory injunction prohibiting Defendant OLDSMAR and all others acting on behalf of, in privity with, or in conjunction with OLDSMAR from enforcing or attempting to enforce the provisions of Resolution 86-14;

c) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT II
THE DEVELOPMENT AGREEMENT AMENDMENT

130. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully set out herein.

131. This is an action for Declaratory Relief pursuant to Chapter 86, Florida Statutes.

132. This is also an action for Injunctive Relief pursuant to § 26.012 (3), F.S.

133. Only one Development Agreement, without amendment, exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR.

134. Instead of agreeing to the automatic termination of the original Development Agreement (as set out in Count III, *infra*), OLDSMAR is attempting to enforce a purported amendment to the Development Agreement which was executed by ROOD and OLDSMAR but which was never executed on behalf of McLAUGHLIN's predecessor COLLEN and which does not bind McLAUGHLIN.

135. Further, the Development Agreement Amendment was established in the course of the following chronology:

a) **March 8, 1990**, McLaughlin begins action against Collen, Case No. 90-4133, *Lis Pendens* filed, O.R. Book 7219, Page 304;

b) **March 20, 1990**, "Amended" Development Agreement executed by City;

c) **May 23, 1990**, "Amended" Development Agreement executed by ROOD;

d) **October 17, 1990**, Collen executes deed of his property to ROOD;

e) **August 9, 1991**, Oldsmar records "Amended" Development Agreement;

f) **August 15, 1991**, ROOD records deed.

g) **May 22, 1992**, Supplemental Final Judgment entered in McLaughlin v. Collen; ¶ 13 provides:

> On filing of the Certificate of Title, the Defendant, KEITH R. COLLEN and all persons claiming under or against said Defendant since the filing of McLAUGHLIN's Notice of Lis Pendens, shall be foreclosed of all estate or claim in the real property hereinbefore described ..." (Exhibit N, attached hereto

and made a part hereof by reference.)

136. Therefore, both the Development Agreement Amendment and COLLEN's deed to ROOD are foreclosed by the final judgment for McLAUGHLIN and his previous Notice of *Lis Pendens*.

137. Thus, at law and in equity, the Development Agreement Amendment is a nullity.

138. A dispute exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR with respect to the status of the Development Agreement Amendment and with respect to the obligations of the parties thereunder.

139. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, pursuant to the Development Agreement Amendment.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court declaring that the Development Agreement Amendment has been foreclosed by McLAUGHLIN's foreclosure of COLLEN's property and is therefore a nullity;

b) Entering a judgment by the Court declaring that the controlling Development Agreement between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR is the original agreement, recorded in Official Records Book 6825, Page 1563, and re-recorded in Official Records Book 6830, Page 897, Public Records of Pinellas County, Florida and that there is no valid and binding amendment to said agreement;

c) Entering a prohibitory injunction prohibiting Defendant OLDSMAR and all others acting on behalf of, in privity with, or in conjunction with OLDSMAR from enforcing or attempting to enforce the provisions of any Development Agreement Amendment applicable to ROOD and McLAUGHLIN's properties;

d) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT III
THE ORIGINAL DEVELOPMENT AGREEMENT

140. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully set out herein.

141. This is an action for Declaratory Relief pursuant to Chapter 86, Florida Statutes.

142. This is also an action for Injunctive Relief pursuant to § 26.012 (3), F.S.

143. Only one Development Agreement, without amendment, exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR.

144. That Development Agreement (Exhibit G) requires, as a condition precedent, that Duane Avenue be constructed as a collector road linking the existing Duane Avenue with State Road (S.R.) 584.

145. Although the text of the Original Development Agreement refers primarily to a collector road, by reference to the Site Plan, it cannot be disputed that the Collector Road described by the Agreement is the existing Duane Avenue and its extension Northward through ROOD's property to S.R. 584.

146. The Site Plan shows the collector road, to which reference is made in ¶¶ 12.(a)(1) and 12(a)(2) of Exhibit G, as being the Northerly extension of Duane Avenue, and no other interpretation of the fact that the Collector Road and Duane Avenue are one and the same is possible.

147. In particular, the Site Plan shows the

Collector Road entering the South limits of ROOD's property, approximately 600 feet West of where Moccasin Creek crosses under the railroad right-of-way. Similarly, the Plat of West Oldsmar, (Exhibit Q, attached hereto and made a part hereof by reference,) shows Duane Avenue (actually extended onto ROOD's property) at approximately 600 feet West of the intersection of Moccasin Creek and the railroad right-of-way. Therefore, there can be no dispute that Duane Avenue as it presently exists, and "The Collector Road" contemplated by the original Development Agreement, are one and the same.

148. Further, the purported Development Agreement Amendment (Exhibit K, at pp. 4 - 5) deletes the requirement of the original agreement with respect to the collector road, which is further proof that the prohibition of the extension of Duane Avenue and the Collector Road are one and the same.

149. Exhibits O hereto, the Executive Summary of a Planning Feasibility Study, and P, a Transportation Analysis, respectively, both demonstrate conclusively that the parties intended the Collector Road to be the Northerly extension of Duane Avenue.

150. Exhibit Q, is an excerpt of the Plat Map of West Oldsmar as maintained in the Official Records of Pinellas County which shows the present Northern terminus of Duane Avenue, with sufficient dimensions shown thereon to show that the collector road designated on the Site Plan was intended to be the Northerly extension of Duane Avenue.

151. In order to lawfully build, operate and maintain Duane Avenue as a collector road between S.R. 580 and S.R. 584, it must be designated as a collector road on the Pinellas County Metropolitan Planning Organization (M.P.O.) Plan, as it is incorporated into the Pinellas County Planning Council Comprehensive Plan.

152. The parties acknowledged this requirement, and Defendant OLDSMAR joined with ROOD, COLLEN and McLAUGHLIN in applications to the P.P.C. to so designate Duane Avenue and its Northerly extension through ROOD's property as a collector road in the Transportation Element of the P.P.C. Comprehensive Plan.

153. The P.P.C., on its own, and through the vehicle of the M.P.O. has refused to amend its Comprehensive Plan to designate Duane Avenue and its Northerly extension through ROOD's property (or

any other collector road joining S.R. 580 with S.R. 584) as a collector road as contemplated in Exhibit G hereto, particularly the Site Plan thereto.

154. Because the P.P.C. merely adopts the M.P.O. Plan as a part of the P.P.C. Comprehensive Plan, the M.P.O. is the final authority on the designation of Duane Avenue and its Northerly extension as a collector road, which designation was required to fulfill the original Development Agreement.

155. By their joint application for an amendment to the M.P.O. Plan, as it is incorporated into the P.P.C. Comprehensive Plan, Plaintiff ROOD, COLLEN as predecessor to Plaintiff McLAUGHLIN, and Defendant OLDSMAR have exhausted their administrative remedies.

156. ROOD challenged the Constitutionality of the P.P.C. as re-established in 1988, in a Federal Complaint, which was dismissed, and Plaintiffs have also exhausted their judicial and legal remedies with respect to the designation of Duane Avenue and its Northerly extension through ROOD's property as a collector road in the M.P.O. Plan as incorporated into the P.P.C. Comprehensive Plan.

157. Therefore, absent a valid amendment to

the original Development Agreement, that agreement is automatically terminated.

158. The Development Agreement further provides that if the designation in the P.P.C. Plan is not obtained, and development as contemplated by the Agreement thus precluded, the Agreement automatically terminates at the time of the preclusion and the parties are to cooperate to restore each other to their pre-agreement positions.

159. ROOD and McLAUGHLIN have declared the Development Agreement to be automatically terminated (Exhibit L), and have demanded that OLDSMAR restore them to their pre-agreement positions, including the return to ROOD of $349,000 paid to OLDSMAR pursuant to the Agreement.

160. OLDSMAR has failed and refused to consider the Development Agreement to be automatically terminated, and has failed and refused to return to ROOD the $349,000 paid pursuant to the original Agreement. (Exhibit M.)

161. A dispute exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR with respect to the status of the Development Agreement and with respect to the

obligations of the parties thereunder.

162. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, pursuant to the Development Agreement.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court declaring that fulfillment of the original Development Agreement is precluded by the refusal of the Pinellas County Planning Council to designate Duane Avenue as a collector road (or, in the alternative, to designate any collector road on the ROOD/McLAUGHLIN properties to join S.R. 580 with S.R. 584) on its Comprehensive Plan and that the Development Agreement is therefore automatically terminated and that the parties are to be restored to their pre-agreement positions;

b) Entering a judgment making the following declaration: that the parties are bound by the original Development Agreement recorded in Official Records Book 6825, Page 1563, and re-recorded in Official Records Book 6830, Page 897, Public Records of Pinellas County, Florida, and that the fulfillment of said agreement has been precluded

by the actions of the Pinellas County Planning Council and that the agreement is therefore automatically terminated;

c) Entering a prohibitory injunction prohibiting Defendant OLDSMAR and all others acting on behalf of, in privity with, or in conjunction with OLDSMAR from enforcing or attempting to enforce the provisions of any Development Agreement applicable to ROOD and McLAUGHLIN's properties;

d) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT IV
THE COMPREHENSIVE PLAN DESIGNATIONS

163. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully set out herein.

164. This is an action for Declaratory Relief pursuant to Chapter 86, Florida Statutes.

165. This is also an action for Mandatory and Prohibitory Injunctions pursuant to § 26.012 (3), F.S.

166. Prior to the adoption by OLDSMAR of its Comprehensive Plan, Plaintiffs' property was

governed solely by the OLDSMAR Zoning Ordinance.

167. The OLDSMAR Zoning Ordinance zoned ROOD's property Residential Planned Development 7.5 units per acre on the Southern approximately 85 acres; and General Commercial on the Northern approximately 15 acres, adjacent to S.R. 584.

168. The OLDSMAR Zoning Ordinance zoned McLAUGHLIN's property Residential Planned Development 7.5 units per acre on the Southern approximately 27 acres; and General Commercial on the Northern approximately 8 acres, adjacent to S.R. 584.

169. Plaintiff ROOD and McLAUGHLIN's predecessor COLLEN, purchased their property based on its reasonable Zoning Districts, without reference to the Comprehensive Plan.

170. When OLDSMAR was required by Chapter 163, Florida Statutes 1979 to adopt a Comprehensive Plan, it elected to simply but unlawfully mimic the Future Land Use designations of the Pinellas County Planning Council Comprehensive Plan.

171. The P.P.C. was subsequently declared to

be unconstitutional and to have improperly adopted its Comprehensive Plan.

172. The designations of ROOD and McLAUGHLIN's properties in the P.P.C. Plan, mimicked in the OLDSMAR Comprehensive Plan, are arbitrary and capricious, not rationally related to a legitimate public purpose, work a taking of all economically beneficial use of Plaintiffs' property, and destroy Plaintiffs' reasonable investment backed expectations.

173. Arbitrary and capricious land use regulations are unconstitutional in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

174. As the parties are required to restore each other to their pre-Development Agreement positions, these designations will again apply to Plaintiffs' properties.

175. In contrast, the Zoning Districts applicable to Plaintiffs' property were carefully established by OLDSMAR after thorough study of the area and the properties, are reasonable and appropriate, and permit economically beneficial use of ROOD and McLAUGHLIN's properties.

176. McLAUGHLIN has never conceded that

the original Comprehensive Plan designations applicable to Plaintiffs' real property were reasonable and appropriate.

177. ROOD's alleged admission that the land use designations on his property were reasonable and appropriate is immaterial because the same alleged admission also stated that the conflicting Zoning Districts governing ROOD's land were reasonable and appropriate.

178. The only marketable site plans available to Plaintiffs are those pursuant to the 1985 Zoning Districts and that attached to the now void original Development Agreement.

179. ROOD having applied unsuccessfully for Comprehensive Plan Amendments in 1985, Plaintiffs have exhausted their administrative remedies.

180. Further, any future efforts to resolve the Comprehensive Plan by pursuing administrative remedies with Defendant OLDSMAR would patently be futile, and thus these alleged remedies need not be pursued. Further, the proposed site plans rejected by OLDSMAR as described in ¶ 103 b), *supra*, required amendments to the Comprehensive Plan, and thus Plaintiffs have also exhausted these alleged

administrative remedies.

181. A dispute exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR with respect to the application of the Pinellas County Planning Council Comprehensive Plan, as mimicked in the OLDSMAR Comprehensive Plan, to Plaintiffs' lands.

182. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, pursuant to the OLDSMAR Comprehensive Plan.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court declaring that the OLDSMAR Comprehensive Plan unlawfully mimicked the invalid Pinellas County Planning Council Comprehensive Plan, and that the designations of the Comprehensive Plan applicable to Plaintiffs' properties are arbitrary and capricious, without a rational relationship to the legitimate exercise of the police power, and work a taking of all economically beneficial use of Plaintiffs' property;

b) Entering a judgment by the Court declaring that the Zoning Districts previously

established by OLDSMAR on Plaintiffs' property are correct and reasonable, and should govern in place of the Comprehensive Plan designations;

c) Entering a prohibitory injunction prohibiting Defendant OLDSMAR and all others acting on behalf of, in privity with, or in conjunction with OLDSMAR from enforcing or attempting to enforce the provisions of the OLDSMAR Comprehensive Plan with respect to ROOD and McLAUGHLIN's properties;

d) Entering a mandatory injunction requiring Defendant OLDSMAR to amend its Comprehensive Plan to make it consistent with the Zoning Districts applicable to Plaintiffs' properties, and to vigorously seek the approval of this amendment from all agencies with jurisdiction;

e) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT V
FAILURE TO ATTACH COMPREHENSIVE PLAN TO ORDINANCE

183. Plaintiffs re-allege and incorporate herein ¶¶ 1 through 110, *supra*, as if fully set out herein.

184. By Ordinance 80-12, Defendant, City of OLDSMAR, purported to adopt a Comprehensive Plan pursuant to Chapter 163, Florida Statutes, 1979.

185. Said Comprehensive Plan was enforced against Plaintiff ROOD, and against McLAUGHLIN's predecessor in title, COLLEN, and damaged their reasonable investment-backed expectations.

186. Section 1 of Ordinance 80-12 states: "That the **attached** Land Use Element of the Oldsmar Comprehensive Plan is hereby adopted, ..." [Emphasis added].

187. No Land Use Element of the Comprehensive Plan is attached to Ordinance 80-12, and no cross-reference to such an Element kept or maintained elsewhere is found in the Ordinance or elsewhere in the City's Official Records.

188. City Staff have expressed uncertainty as to the official status, or lack thereof, of the document enforced as the Land Use Element of the Comprehensive Plan.

189. The failure of Defendant to attach or otherwise cross-reference the element, makes that portion of the Comprehensive Plan null and void *ab initio*.

190. A dispute exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR with respect to the application of the OLDSMAR Comprehensive Plan which is not attached to Ordinance 80-12, to Plaintiffs' lands.

191. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, pursuant to the OLDSMAR Comprehensive Plan.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court declaring that the OLDSMAR Comprehensive Plan is unlawful and null and void *ab initio* for failure of the City to attach the Land Use Element of the Comprehensive Plan to Ordinance 80-12;

b) Entering a judgment by the Court declaring that the Zoning Districts previously established by OLDSMAR on Plaintiffs' property are correct and reasonable, and should govern in place of the Comprehensive Plan designations;

c) Entering a prohibitory injunction prohibiting Defendant OLDSMAR and all others acting on behalf of, in privity with, or in conjunction with OLDSMAR from enforcing or attempting to

enforce the provisions of the OLDSMAR Comprehensive Plan with respect to ROOD and McLAUGHLIN's properties;

d) Entering a mandatory injunction requiring Defendant OLDSMAR to amend its Comprehensive Plan to make it consistent with the Zoning Districts applicable to Plaintiffs' properties, and to vigorously seek the approval of this amendment from all agencies with jurisdiction;

e) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

D. COMPLAINT FOR RECISION OF CONTRACT
COUNT VI
SEWAGE CAPACITY SALE UNLAWFUL RESOLUTION

192. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully set out herein.

193. This is an action for recision of contract, which contract is found as Exhibit F hereto.

194. Prior to the adoption of Resolution 86-14 the purchase and allocation of sewage capacity in OLDSMAR was governed by Ordinance 85-37.

195. Resolution 86-14 purported to amend Ordinance 85-37.

196. Under Florida law, an Ordinance may not be amended except by another Ordinance. In particular, an Ordinance may not be amended by a resolution.

197. Although Resolution 86-14 alleges, on its face, its consistency with Ordinance 85-37, the Resolution is, in fact, inconsistent, and is a *de facto* and *de jure* amendment to the Ordinance in the following substantial and material ways:

a) Ordinance 85-37 provides for the payment of impact fees at times certain in the building process; Resolution 86-14 requires the payment of impact fees at 12:00 noon on June 27, 1986;

b) As an alternative to the payment of impact fees during the building process, Ordinance 85-37, itself, provides a mechanism for an advance reservation of sewage capacity, with payments made pursuant thereto being refundable; Resolution 86-14

provides that reservation fees are non-refundable;

c) Ordinance 85-37 makes no provision for the availability of water and sewer service to "small" projects; Resolution 86-14 sets aside 25% of the City's available water and sewer capacity for "small projects";

d) Ordinance 85-37 provides that sewage capacity reserved may be used anywhere in the City's sewer service area; Resolution 86-14 limits the use of reserved capacity to property precisely defined in the reservation.

198. Therefore, and notwithstanding the allegation on the face of Resolution 86-14 that it is consistent with Ordinance 85-37, the Resolution is inconsistent and actually and unlawfully amends the Ordinance, and, thus there is no repugnancy between this Complaint and Exhibit D. Therefore, Resolution 86-14 must be declared null and void.

199. In the procedures used by Defendant OLDSMAR in the sewage capacity sale, OLDSMAR

knowingly and unlawfully entered into a contract (Exhibit F hereto) with ROOD, with said contract being provided for and set forth in Resolution 86-14, which unlawfully amended Ordinance 85-37.

200. As a contract authorized by unlawful means, the contract between ROOD and OLDSMAR for the purchase of sewage treatment capacity is null and void *ab initio*, and must therefore be rescinded and OLDSMAR be required to return to ROOD the $715,000 which ROOD paid to OLDSMAR pursuant to the contract.

201. ROOD has demanded cancellation of the contract and refund of the funds paid pursuant thereto, but OLDSMAR has refused to cancel the contract and refund the monies paid pursuant thereto.

202. Plaintiffs have no adequate remedy at law because Plaintiff is presently required to leave with OLDSMAR funds which OLDSMAR obtained illegally and is not entitled to keep.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering an Order by this Court rescinding the contract (Exhibit F) between ROOD and OLDSMAR and compelling OLDSMAR to

return to ROOD the $715,000 which he paid pursuant to Exhibit F, together with pre-judgment interest, and declaring that ROOD has not pre-purchased sewage capacity.

b) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT VII
SEWAGE CAPACITY SALE
DURESS

203. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully set out herein.

204. This is an action for recision of contract, (Exhibit F).

205. Pursuant to the alleged requirements of Resolution 86-14, ROOD entered into a contract for the purchase of sewage capacity in OLDSMAR.

206. ROOD's purchase of sewage capacity pursuant to Resolution 86-14 was made under duress, with ROOD being unable to exercise free agency, for the following reasons.

207. ROOD's duress had as its direct and proximate cause, the following unlawful actions of Defendant OLDSMAR:

a) The imposition of the designations of an unlawful and arbitrary and capricious Comprehensive Plan designation on ROOD's real property;

b) The unlawful rejection of ROOD's development proposals based on the unlawful Comprehensive Plan; and

c) The unlawful amendment by Defendant OLDSMAR of Ordinance 85-37 by Resolution 86-14;

as a result of which ROOD acted involuntarily and was unable to exercise his free choice or will, all as a direct result of the improper and coercive actions of Defendant OLDSMAR.

208. Therefore, ROOD was not a free agent when he entered into the alleged contract (Exhibit F).

209. Because the contract (Exhibit F,) between ROOD and OLDSMAR was entered under duress, and was promulgated as the result of the unlawful conduct of Defendant OLDSMAR, there is no independent obligation for ROOD to honor the

contract.

210. In the procedures used by Defendant OLDSMAR in the sewage capacity sale, OLDSMAR knowingly and unlawfully, by placing ROOD under duress and depriving him of his free agency, entered into an unlawful contract (Exhibit F hereto) with ROOD, as a direct result of the duress imposed on ROOD.

211. As a contract obtained only under duress, the contract between ROOD and OLDSMAR for the purchase of sewage treatment capacity is null and void *ab initio*, and must therefore be rescinded and OLDSMAR be required to return to ROOD the $715,000 which ROOD paid to OLDSMAR pursuant to the contract.

212. ROOD has demanded cancellation of the contract and refund of the funds paid pursuant thereto, but OLDSMAR has refused to cancel the contract and refund the monies paid pursuant thereto.

213. Plaintiffs have no adequate remedy at law because Plaintiff is presently required to leave with OLDSMAR funds which OLDSMAR obtained illegally and is not entitled to keep.

WHEREFORE, Plaintiffs demand judgment

against Defendant OLDSMAR, as follows:

a) Entering an Order by this Court rescinding the contract (Exhibit F) between ROOD and OLDSMAR and compelling OLDSMAR to return to ROOD the $715,000 which he paid pursuant to Exhibit F, together with pre-judgment interest, and declaring that ROOD has not pre-purchased sewage capacity.

b) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

A jury trial is demanded for this Count.

E. COMPLAINT FOR DAMAGES

COUNT VIII

REFUSAL TO TERMINATE DEVELOPMENT AGREEMENT AND REFUND FEES

214. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive as if fully set out herein.

215. Only one Development Agreement, without amendment, exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR.

216. Instead of agreeing to the automatic termination of the original Development Agreement (as set out in Count III, *supra*), OLDSMAR is

attempting to enforce a purported amendment to the Development Agreement which was executed by ROOD and OLDSMAR but which was never executed on behalf of McLAUGHLIN's predecessor COLLEN and which does not bind McLAUGHLIN.

217. Further, the Development Agreement Amendment was established in the course of the following chronology:

a) **March 8, 1990**, McLaughlin begins action against Collen, Case No. 90-4133, *Lis Pendens* filed, O.R. Book 7219, Page 304;

b) **March 20, 1990**, "Amended" Development Agreement executed by City;

c) **May 23, 1990**, "Amended" Development Agreement executed by ROOD;

d) **October 17, 1990**, Collen executes deed of his property to ROOD;

e) **August 9, 1991**, Oldsmar records "Amended" Development Agreement;

f) **August 15, 1991**, ROOD records

deed.

g) **May 22, 1992**, Supplemental Final Judgment entered in McLaughlin v. Collen; ¶ 13 provides:

> On filing of the Certificate of Title, the Defendant, KEITH R. COLLEN and all persons claiming under or against said Defendant since the filing of McLAUGHLIN's Notice of Lis Pendens, shall be foreclosed of all estate or claim in the real property hereinbefore described ..." (Exhibit N).

218. Therefore, both the Development Agreement Amendment and COLLEN's deed to ROOD are foreclosed by the final judgment for McLAUGHLIN and his previous Notice of *Lis Pendens*.

219. Thus, at law and in equity, the Development Agreement Amendment is a nullity.

220. The Original Development Agreement (Exhibit G) requires, as a condition precedent, that Duane Avenue be constructed as a collector road

linking the existing Duane Avenue with State Road (S.R.) 584.

221. Although the text of the Original Development Agreement refers primarily to a collector road, by The Site Plan it cannot be disputed that the Collector Road described by the Agreement is the existing Duane Avenue and its extension Northward through ROOD's property to S.R. 584.

222. The Site Plan shows the collector road, to which reference is made in ¶¶ 12.(a)(1) and 12(a)(2) of Exhibit G, as being the Northerly extension of Duane Avenue, and no other interpretation of the fact that the Collector Road and Duane Avenue are one and the same is possible.

223. In particular, the Site Plan shows the Collector Road entering the South limits of ROOD's property, approximately 600 feet West of where Moccasin Creek crosses under the railroad right-of-way. Similarly, the Plat of West Oldsmar, (Exhibit Q,) shows Duane Avenue (actually extended onto ROOD's property) at approximately 600 feet West of the intersection of Moccasin Creek and the railroad right-of-way. Therefore, there can be no dispute that Duane Avenue as it presently exists, and "The Collector Road" contemplated by the original

Development Agreement, are one and the same.

224. Further, the purported Development Agreement Amendment (Exhibit K, at pp. 4 - 5) deletes the requirement of the original agreement with respect to the collector road, which is further proof that the prohibition of the extension of Duane Avenue and the Collector Road are one and the same.

225. Exhibits O hereto, the Executive Summary of a Planning Feasibility Study, and P, a Transportation Analysis, respectively, both demonstrate conclusively that the parties intended the Collector Road to be the Northerly extension of Duane Avenue.

226. Exhibit Q, is an excerpt of the Plat Map of West Oldsmar as maintained in the Official Records of Pinellas County which shows the present Northern terminus of Duane Avenue, with sufficient dimensions shown thereon to show that the collector road designated on the Site Plan was intended to be the Northerly extension of Duane Avenue.

227. In order to lawfully build, operate and maintain Duane Avenue as a collector road between S.R. 580 and S.R. 584, it must be designated as a collector road on the Pinellas County Metropolitan

Planning Organization (M.P.O.) Plan, as it is incorporated into the Pinellas County Planning Council Comprehensive Plan.

228. The parties acknowledged this requirement, and Defendant OLDSMAR joined with ROOD, COLLEN and McLAUGHLIN in applications to the P.P.C. to so designate Duane Avenue.

229. Because the P.P.C. merely adopts the M.P.O. Plan as a part of the P.P.C. Comprehensive Plan, the M.P.O. is the final authority on the designation of Duane Avenue as a collector road, which designation was required to fulfill the original Development Agreement.

230. By their joint application for an amendment to the M.P.O. Plan, as it is incorporated into the P.P.C. Comprehensive Plan, Plaintiff ROOD, COLLEN as predecessor to Plaintiff McLAUGHLIN, and Defendant OLDSMAR have exhausted their administrative remedies.

231. By ROOD's challenge to the Constitutionality of the P.P.C. as re-established in 1988, Plaintiffs have also exhausted their judicial and legal remedies with respect to the designation of Duane Avenue as a collector road in the M.P.O. Plan

as incorporated into the P.P.C. Comprehensive Plan.

232. Therefore, absent a valid amendment to the original Development Agreement, that agreement is automatically terminated.

233. The Development Agreement further provides that if the designation in the P.P.C. Plan is not obtained, and development as contemplated by the Agreement thus precluded, the Agreement automatically terminates at the time of the preclusion and the parties are to cooperate to restore each other to their pre-agreement positions.

234. ROOD and McLAUGHLIN have declared the Development Agreement to be automatically terminated (Exhibit L), and have demanded that OLDSMAR restore them to their pre-agreement positions, including the return to ROOD of $349,000 paid to OLDSMAR pursuant to the Agreement.

235. OLDSMAR has failed and refused to consider the Development Agreement to be automatically terminated, and has failed and refused to return to ROOD the $349,000 paid pursuant to the original Agreement. (Exhibit M.)

236. In its refusal to accept the automatic termination of the original Development Agreement,

and to refund to ROOD the $349,000 he paid pursuant to that Agreement, OLDSMAR knowingly and unlawfully obtained and used the property of ROOD with the intent to unlawfully deprive ROOD of his property and the benefits therefrom and appropriate that property to its own use, in open and notorious violation of the law, and damaged ROOD thereby.

237. ROOD has been damaged by the actions of OLDSMAR in that he has been unlawfully deprived of the use of his $349,000, the interest therefrom, and the costs of securing the money.

238. The damage inflicted on ROOD by OLDSMAR was intentional, malicious, without any pretext whatsoever as being in fulfillment of a legitimate governmental purpose.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Awarding damages to ROOD in the actual amount of damages incurred by ROOD, together with pre-judgment interest and costs;

b) Awarding punitive damages to ROOD in an amount commensurate with the egregiousness of OLDSMAR's action, and with the

OLDSMAR's ability to pay;

c) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT IX
ARBITRARY AND CAPRICIOUS LAND USE DESIGNATIONS

239. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully set out herein.

240. Prior to the adoption by OLDSMAR of its Comprehensive Plan, Plaintiffs' property was governed solely by the OLDSMAR Zoning Ordinance.

241. The OLDSMAR Zoning Ordinance zoned ROOD's property Residential Planned Development 7.5 units per acre on the Southern approximately 85 acres; and General Commercial on the Northern approximately 15 acres, adjacent to S.R. 584.

242. The OLDSMAR Zoning Ordinance zoned McLAUGHLIN's property Residential Planned Development 7.5 units per acre on the Southern approximately 27 acres; and General Commercial on the Northern approximately 8 acres,

adjacent to S.R. 584.

243. Plaintiff ROOD and McLAUGHLIN's predecessor COLLEN, purchased their property based on its reasonable Zoning Districts, without reference to the Comprehensive Plan.

244. When OLDSMAR was required by Chapter 163, Florida Statutes 1979 to adopt a Comprehensive Plan, it elected to simply but unlawfully mimic the Future Land Use designations of the Pinellas County Planning Council Comprehensive Plan.

245. The P.P.C. was subsequently declared to be unconstitutional and to have improperly adopted its Comprehensive Plan.

246. The designations of ROOD and McLAUGHLIN's properties in the P.P.C. Plan, mimicked in the OLDSMAR Comprehensive Plan, are arbitrary and capricious, not rationally related to a legitimate public purpose, and therefore work a taking of all economically beneficial use of Plaintiffs' property, and destroy Plaintiffs' reasonable investment backed expectations.

247. Arbitrary and capricious land use regulations are an unconstitutional denial of substantive due process.

248. Arbitrary and capricious land use regulations are unconstitutional in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

249. As the parties are required to restore each other to their pre-Development Agreement positions, these designations will again apply to Plaintiffs' properties.

250. In contrast, the Zoning Districts applicable to Plaintiffs' property were carefully established by OLDSMAR after thorough study of the area and the properties, are reasonable and appropriate, and permit economically beneficial use of ROOD and McLAUGHLIN's properties.

251. McLAUGHLIN has never conceded that the original Comprehensive Plan designations applicable to Plaintiffs' real property were reasonable and appropriate.

252. ROOD's alleged admission that the land use designations on his property were reasonable and appropriate is immaterial because the same alleged admission also stated that the conflicting Zoning Districts were reasonable and appropriate.

253. The only marketable site plans available to Plaintiffs are those pursuant to the 1985 Zoning

Districts and that attached to the now void original Development Agreement.

254. ROOD having applied unsuccessfully for Comprehensive Plan Amendments in 1985, Plaintiffs have exhausted their administrative remedies.

255. Any future efforts to resolve the Comprehensive Plan by pursuing administrative remedies with Defendant OLDSMAR would patently be futile, and thus these alleged remedies need not be pursued. Further, the proposed site plans rejected by OLDSMAR as described in ¶ 99 b), *supra*, required amendments to the Comprehensive Plan, and thus Plaintiffs have also exhausted these alleged administrative remedies.

256. The imposition by Defendant OLDSMAR of the Comprehensive Plan designations on Plaintiffs' property was arbitrary and capricious and not rationally related to the legitimate exercise of the police power.

257. By the arbitrary and capricious application of the unlawful Comprehensive Plan designations which simply mimicked the unlawful P.P.C. Comprehensive Plan, Defendant OLDSMAR took all economically beneficial use of Plaintiffs'

property rights in their property, damaging the Plaintiffs thereby, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and of 42 U.S.C. § 1983 and of the Constitution of the State of Florida.

258. The actions of Defendant OLDSMAR which were arbitrary and capricious, were actions by Defendant under color of state law, in open and notorious violation of the rights of Plaintiffs to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and by the Constitution of the State of Florida, and Plaintiffs were damaged thereby.

259. The actions of Defendant which were arbitrary and capricious, interfered with Plaintiffs' reasonable, investment-backed expectations, damaging the Plaintiffs thereby. In particular:

a) the arbitrary and capricious Open Space designation on the McLAUGHLIN/COLLEN property denies McLAUGHLIN all use of that property;

b) the arbitrary and capricious Urban Low Density Residential designation on the North 15 acres

of ROOD's property is not rationally related to the legitimate exercise of the police power of the City;

c) Therefore, the designations, being arbitrary and capricious, work a taking of Plaintiffs' property.

260. As a result of said arbitrary and capricious actions of Defendant OLDSMAR, and OLDSMAR's interference with and violation of their civil rights, Plaintiffs lost opportunities to sell their property at a profit or to enter into business relationships for the property, and were required to pay on-going expenses related to their property, and were damaged thereby.

261. As a result of Defendant's unlawful actions, Plaintiffs lost the opportunity of selling their real property at a profit, they were also unlawfully denied the opportunity of investing the proceeds of such sales, and were damaged thereby.

262. Said damages occurred beginning for ROOD in the fall of 1985, and for McLAUGHLIN on June 30, 1992, and will continue until restitution is made by Defendant OLDSMAR.

263. Defendant knew or should reasonably

have known that its arbitrary and capricious actions would deny Plaintiffs protection of the Fifth and Fourteenth Amendments to the Constitution of the United States, thereby violating the provisions of 42 U.S.C., § 1983 and damaging Plaintiffs.

264. The damage inflicted on ROOD and McLAUGHLIN by OLDSMAR was intentional, malicious, without any pretext whatsoever as being in fulfillment of a legitimate governmental purpose.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Awarding damages to ROOD and McLAUGHLIN in the actual amount of damages incurred by ROOD and McLAUGHLIN, together with pre-judgment interest and costs;

b) Awarding punitive damages to ROOD and McLAUGHLIN in an amount commensurate with the egregiousness of OLDSMAR's action, and with OLDSMAR's ability to pay;

c) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

A jury trial is demanded for this Count.

COUNT X
FAILURE TO ATTACH COMPREHENSIVE PLAN TO ORDINANCE

265. Plaintiffs re-allege and incorporate herein ¶¶ 1 through 110, *supra*, as if fully set out herein.

266. By Ordinance 80-12, Defendant, City of OLDSMAR, purported to adopt a Comprehensive Plan pursuant to Chapter 163, Florida Statutes, 1979.

267. Said Comprehensive Plan was enforced against Plaintiff ROOD, and against McLAUGHLIN's predecessor in title, COLLEN, and damaged their reasonable investment-backed expectations.

268. Section 1 of Ordinance 80-12 states: "That the **attached** Land Use Element of the Oldsmar Comprehensive Plan is hereby adopted, ..." [Emphasis added].

269. No Land Use Element is attached to Ordinance 80-12, and no cross-reference to such an Element kept or maintained elsewhere is found in the Ordinance or elsewhere in the City's Official Records.

270. City Staff have expressed uncertainty as to the official status, or lack thereof, of the

document enforced as the Land Use Element of the Comprehensive Plan.

271. The failure of Defendant to attach or otherwise cross-reference the element, makes that portion of the Comprehensive Plan null and void *ab initio*.

272. As the parties are required to restore each other to their pre-Development Agreement positions, these designations will again apply to Plaintiffs' properties.

273. As a result of the actions of Defendant OLDSMAR in enforcing a void Comprehensive Plan against Plaintiffs, and of OLDSMAR's interference with and violation of their civil rights thereby, Plaintiffs lost opportunities to sell their property at a profit or to enter into business relationships for the property, and were required to pay on-going expenses related to their property, and were damaged thereby.

274. As a result of Defendant's unlawful actions, Plaintiffs lost the opportunity of selling their real property at a profit, they were also unlawfully denied the opportunity of investing the proceeds of such sales, and were damaged thereby.

275. Said damages occurred beginning for

ROOD in the fall of 1985, and for McLAUGHLIN on June 30, 1992, and will continue until restitution is made by Defendant OLDSMAR.

276. Defendant knew or should reasonably have known that its actions in enforcing a void Comprehensive Plan would deny Plaintiffs protection of the Fifth and Fourteenth Amendments to the Constitution of the United States, thereby violating the provisions of 42 U.S.C., § 1983 and damage Plaintiffs.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Awarding damages to ROOD and McLAUGHLIN in the actual amount of damages incurred by ROOD and McLAUGHLIN, together with pre-judgment interest and costs;

b) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

A jury trial is demanded for this Count.

COUNT XI
DELAY

277. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully

set out herein.

278. Procedural due process of law, required by the Fifth and Fourteenth Amendments to the Constitution of the United States, requires that applications to agencies acting under color of state law, be processed in an equitable fashion, without undue delay.

279. Procedural due process further requires that delays not be imposed for pretextual reasons or for improper motives.

280. Defendants OLDSMAR, PINTA and STASZKO, acting under color of state law, in causing delays by refusing to approve a reasonable use of Plaintiffs' property, which refusal was arbitrary, capricious, and not based on competent substantial evidence, in violation of 42 U.S.C. § 1983, denied Plaintiffs procedural due process of law, and therefore the economically beneficial use of their property.

281. The delays and refusal of Defendants to approve any reasonable development proposal for Plaintiffs' real property were pretextual in nature, and based on an improper motive.

282. The delays and refusal of Defendants to approve any reasonable development proposal for

Plaintiffs' real property took, through the operation of the City's Land Development Regulations, all economically beneficial use of Plaintiffs' property without compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and in violation of 42 U.S.C. § 1983 and of the Florida Constitution.

283. Said deprivation occurred beginning in April, 1990, and will continue until restitution is made.

284. Defendants' refusal to consider and approve a reasonable development plan for Plaintiffs' property was simply a pretext to stop, delay and/or minimize the yield of the development of Plaintiffs' land.

285. Defendant PINTA's actions were a pretext to assist his son in his proposed acquisition of the land now owned by McLAUGHLIN.

286. Defendants' delay and refusal to approve a reasonable development plan, further interfered with Plaintiffs' investment-backed expectations, arising from their analysis of the OLDSMAR Zoning Ordinance and of reasonable development potential of their properties.

287. Acting under color of state law, in open, notorious and repeated violation of the Fifth and Fourteenth Amendments to the Constitution of the United, States, Defendants acted arbitrarily and capriciously, in delaying that approval of a reasonable development plan for Plaintiffs' property.

288. During the period when Defendants refused to approve a reasonable development plan for Plaintiffs' land, Plaintiffs, through the operation of OLDSMAR's Land Development Regulations, lost all economically beneficial use of their property.

289. During this period when Plaintiffs lost all economically beneficial use of their property, Plaintiffs lost opportunities to sell their property at a profit, were required to pay on-going expenses related to their property, and were denied the benefit of the profits from their property.

290. The actions of Defendants, all under color of state law deprived Plaintiffs of Procedural Due Process of Law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. Plaintiffs are entitled to an award of damages for these actions, under color of state law, of Defendants.

291. The damage inflicted on ROOD and

McLAUGHLIN by OLDSMAR, PINTA and STASZKO was intentional, malicious, without any pretext whatsoever as being in fulfillment of a legitimate governmental purpose.

WHEREFORE, Plaintiffs demand judgment against Defendants OLDSMAR, PINTA and STASZKO, as follows:

a) Awarding damages to ROOD and McLAUGHLIN in the actual amount of damages incurred by ROOD and McLAUGHLIN, together with pre-judgment interest and costs;

b) Awarding punitive damages to ROOD and McLAUGHLIN in an amount commensurate with the egregiousness of OLDSMAR's action, and with the OLDSMAR's ability to pay;

c) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

A jury trial is demanded for this Count.

COUNT XII
SLANDER OF TITLE

292. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 110, *supra*, inclusive, as if fully

set out herein.

293. This Count is pled as an alternative to Count II, *supra*, because if the Court finds that McLAUGHLIN's Notice of *Lis Pendens* forecloses the Development Agreement Amendment, then no Slander of Title will have occurred.

294. By the recording and maintaining of the Amended Development Agreement, which Agreement has never been executed to bind McLAUGHLIN or McLAUGHLIN's predecessor in title, Defendant has slandered the title of Plaintiffs' real property in that Defendant falsely and maliciously communicated to third parties a false idea about McLAUGHLIN's ownership of the subject real property.

295. Said slander has prevented Plaintiffs from freely dealing with the property, including refinancing the property, selling the property, or securing joint venture partners or merchant developers to develop the property.

296. Said slander has also caused Plaintiffs embarrassment and loss of reputation.

297. By the slandering the title of Plaintiffs' real property, Defendant OLDSMAR has damaged Plaintiffs.

298. The damage inflicted on Plaintiffs by Defendant OLDSMAR was intentional, malicious, without any pretext whatsoever as being in fulfillment of a legitimate governmental purpose.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Awarding damages to ROOD and McLAUGHLIN in the actual amount of damages incurred by ROOD and McLAUGHLIN, together with pre-judgment interest and costs;

b) Awarding punitive damages to ROOD and McLAUGHLIN in an amount commensurate with the egregiousness of OLDSMAR's action, and with the OLDSMAR's ability to pay;

c) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

A jury trial is demanded for this Count.

Respectfully submitted,

_____

E. B. Rood,

Plaintiff, *pro se*
200 North Pierce Street,
Tampa, Fl., 33602
(813) 229-6591

R. Bruce McLaughlin,
Plaintiff, *pro se*
900 Gulf Blvd., # 303
Indian Rocks Beach, Fl.,
34635
(813) 595-7634

I hereby certify that a true copy of the foregoing has been furnished to: Bryan Kutchins, Esq., P.O. Box 1063, Oldsmar, Fl., 34677, Eric Ager, 3375 Hunt Club Drive, Clearwater, Fl., 34621, and to Honorable Bernie McCabe, State Attorney, Sixth Judicial Circuit, 5100 144th Avenue North, Clearwater, Fl., 34620 by regular United States Mail, this _____ day of August, 1993.

E. B. Rood

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA CIVIL DIVISION

E. B. ROOD and R. BRUCE McLAUGHLIN,
Plaintiffs

v. Case No. 92-92-3764 CI 16

THE CITY OF OLDSMAR, a Florida Municipal Corporation, THOMAS PINTA and NICK STASZKO, in their individual and personal capacities, and ERIC AGER
Defendants

_____/

LIST OF EXHIBITS

A. Legal Description, ROOD Property

B. Legal Description, McLAUGHLIN/COLLEN Property

C. Ordinance 85-37

D. Resolution 86-14

E. Objection to Sewage Capacity Sale

F. Contract Pursuant to Resolution 86-14

G. Development Agreement

H. Pinellas County Planning Council Resolution 90-4

I. ROOD/OLDSMAR Petition to the Florida Department of Community Affairs

J. Letter, Collen's Attorney to Oldsmar, 5/25/90, reflecting objections of Collen to Amended Development Agreement

K. Purported Amended Development Agreement

L. Demand for Termination of Development Agreement and Refund of Money

M. City's Refusal of Demand

N. Notice of *Lis Pendens* and Supplemental Final Judgment of Foreclosure, McLAUGHLIN v. COLLEN, case No. 90-4133-007

O. Executive Summary, Planning Feasibility Study, Rood/Collen Properties, May, 1987

P. Transportation Analysis, Collen/Rood

Properties, June, 1987

Q. Excerpt, West Oldsmar Plat

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA CIVIL DIVISION

E. B. ROOD and R. BRUCE McLAUGHLIN,
Plaintiffs

v. Case No. 92-92-3764CI 07

THE CITY OF OLDSMAR, a Florida Municipal Corporation, THOMAS PINTA and NICK STASZKO, in their individual and personal capacities, and ERIC AGER
Defendants

_____/

FOURTH AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, FOR RECISION OF CONTRACT, AND FOR DAMAGES

DEMAND FOR A JURY TRIAL

Plaintiffs E. B. ROOD (hereinafter "ROOD") and R. BRUCE McLAUGHLIN (hereinafter "McLAUGHLIN") sue Defendants the CITY OF OLDSMAR (hereinafter "OLDSMAR"), THOMAS PINTA (hereinafter "PINTA"), NICK STASZKO (hereinafter "STASZKO"), and ERIC AGER (hereinafter "AGER"), and for their Complaint allege as follows:

A. INTRODUCTION

I. JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to § 26.012(2)(a), Florida Statutes. This is, in part, an action for damages in excess of $15,000, exclusive of interest, costs and attorneys' fees.

2. The jurisdiction of this Court is invoked pursuant to § 86.011, Florida Statutes, which authorizes Circuit Courts to enter declaratory judgments within their monetary jurisdictional limits.

3. The jurisdiction of this Court is also invoked pursuant to § 26.012 (3), F.S., which authorizes Circuit Courts to issue injunctions.

4. The jurisdiction of this Court is also invoked pursuant the Fifth and Fourteenth Amendments to the Constitution of the United

States, to 42 U.S.C. § 1983, and to 28 U.S.C. §1343(a)(3).

5. This Court has concurrent jurisdiction with the United States District Court under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 pursuant to *Howlett v. Rose*, 110 S.Ct. 2430 (1990).

6. This is a cause of action arising under the Fifth and Fourteenth Amendments to the Constitution of the United States as enforced through 42 U.S.C. § 1983. Plaintiffs allege that Defendants, acting under color of state law, deprived Plaintiffs of rights, privileges and immunities guaranteed by the Constitution of the United States. This Court has jurisdiction over actions under 42 U.S.C. § 1983 as set out in ¶¶ 4 and 5, *supra*.

7. With respect to Part B, *infra*, Declaratory Judgment against AGER, and with respect to Part C, *infra*, Declaratory and Injunctive Relief against OLDSMAR, Plaintiffs assert that their positions espoused in this Complaint are legally sound and supported by fact and law. The Defendants' actions, however, have created a *bona fide* controversy between the parties. Plaintiffs require, therefore, a declaratory judgment declaring their rights, privileges and immunities.

8. In particular, McLAUGHLIN not being a party to any of the preceding transactions with OLDSMAR, requires a Declaratory Judgment setting forth his rights, obligations and privileges related to:

a) The governing law re. the payment of sewage impact fees;

b) The status of the Original Development Agreement and the Amended Development Agreement which OLDSMAR alleges apply to McLAUGHLIN's real property;

c) The validity and applicability of the Future Land Use Element of the City of OLDSMAR Comprehensive Plan, as it existed in 1982, to McLAUGHLIN's real property.

9. With respect to Part B, *infra*, Declaratory Judgment against AGER, and with respect to Part C, *infra*, Declaratory and Injunctive Relief against OLDSMAR, Plaintiffs have no adequate remedy at law.

10. With respect to Part C, *infra*, Declaratory and Injunctive Relief against

OLDSMAR, Plaintiffs, will suffer irreparable harm if Defendants are allowed to continue their conduct sought to be enjoined herein.

II. THE PARTIES

11. Plaintiff, E. B. ROOD is the owner of that certain parcel of real property located within the corporate limits of Defendant, the CITY OF OLDSMAR and more particularly described on Exhibit A, attached to the Third Amended Complaint herein and made a part hereof by reference. ROOD has been the owner of said property at all material times.

12. Plaintiff McLAUGHLIN is the owner of that certain parcel of real property located within the corporate limits of Defendant, the CITY OF OLDSMAR and more particularly described on Exhibit B, attached to the Third Amended Complaint herein and made a part hereof by reference. McLAUGHLIN is the successor by foreclosure to KEITH R. COLLEN (hereinafter "COLLEN").

13. Defendant, OLDSMAR is a Florida Municipal Corporation.

14. All actions of Defendant OLDSMAR complained of herein were actions under color of

state law, and were official policy, custom and usage of OLDSMAR in violation of immunities, rights and privileges guaranteed to Plaintiffs by the Constitution and Laws of the United States and of the State of Florida.

15. The actions of Defendant OLDSMAR were further a part of a pattern of misconduct as demonstrated in this Complaint and by the actions of Defendant towards other Developers, which pattern of misconduct is the official policy and custom of the City. This pattern, custom and usage further has deprived, and is continuing to deprive, Plaintiffs of Constitutionally protected rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

16. The pattern of misconduct, official policy, custom and usage of Defendant OLDSMAR was the direct and proximate cause of the damages suffered by Plaintiffs as set out *infra*.

17. Defendant PINTA was at all material times a member of the City Council of the CITY OF OLDSMAR and is sued in his individual and personal capacities.

18. Defendant STASZKO was at all material times the Planning Director of the CITY OF

OLDSMAR and is sued in his individual and personal capacities

19. Defendant AGER is a Consultant to ROOD and COLLEN who asserts a claim against ROOD and COLLEN related to issues herein.

III. GENERAL ALLEGATIONS

III.A. HISTORICAL BACKGROUND

20. ROOD purchased his property, (comprising approximately 100 acres) in 1982.

21. McLAUGHLIN's predecessor in title, COLLEN, purchased his property, (comprising approximately 35 acres), in 1982.

22. McLAUGHLIN acquired COLLEN's former property through the foreclosure of a mechanic's lien recorded in the Public Records of Pinellas County, Florida.

23. Previously, COLLEN had attempted to sell his property to ROOD by means of a deed executed on October 17, 1990 and recorded on August 15, 1991 in Official Records Book 7653, Page 274, Public Records of Pinellas County, Florida.

24. However, the transaction from COLLEN to ROOD was barred by McLAUGHLIN's Notice of

Lis Pendens, recorded on March 8, 1990 in Official Records Book 7219, Page 304, Public Records of Pinellas County, Florida.

25. Accordingly, McLAUGHLIN has good and marketable title to the property described on Exhibit B.

26. At the time of ROOD's purchase of the property described on Exhibit A, said property was zoned C-2, General Commercial (approximately 15 acres along the S.R. 584 frontage) and R.P.D. 7.5, Residential Planned Development, 7.5 units per acre (approximately 85 acres in the South part of the property).

27. At the time of ROOD's purchase of the property described on Exhibit A, said property was designated Urban Low Density Residential in the purported OLDSMAR Comprehensive Plan.

28. At the time of COLLEN's purchase of the property described on Exhibit B, said property was zoned C-2, General Commercial (approximately 8 acres along the S.R. 584 frontage) and R.P.D. 7.5, Residential Planned Development, 7.5 units per acre (approximately 27 acres in the South part of the property).

29. At the time of COLLEN's purchase of

the property described on Exhibit B, said property was designated Open Space in the purported OLDSMAR Comprehensive Plan.

30. When McLAUGHLIN first obtained a judgment against COLLEN, and had the Pinellas County Sheriff levy against COLLEN's property to satisfy that judgment, John Pinta, son of Defendant THOMAS PINTA, appeared at the Sheriff's sale with the announced intention of bidding for the property. However, McLAUGHLIN elected to postpone the sale and no bids were taken.

31. When McLAUGHLIN secured a judgment on his Mechanic's Lien, and foreclosed said lien, John Pinta, son of Defendant THOMAS PINTA, appeared at the Clerk's sale and bid for the property.

32. In the latter part of the negotiations with OLDSMAR, beginning in approximately June, 1990, (and just after McLAUGHLIN commenced his action against COLLEN,) Defendant PINTA, as a Member of the City Council, became intransigent as to ROOD's development proposals and led the City in obstructing and delaying the reasonable development of Plaintiffs' property.

III.B. DEVELOPMENT OVERTURES

33. Beginning in 1985, ROOD attempted to develop his property in accordance with the OLDSMAR Zoning Ordinance.

34. In particular, ROOD made application to OLDSMAR for the issuance of site development approvals and Building Permits for a Shopping Center of approximately 150,000 square feet to be located on the 15 acres of ROOD's property zoned C-2.

35. ROOD's application for site development approval and Building Permits was denied by OLDSMAR because the proposed use was inconsistent with the Comprehensive Plan designation of Urban Low Density Residential.

36. Contemporaneously with ROOD's applications to OLDSMAR, McLAUGHLIN's predecessor COLLEN also made enquiries of the City with respect to the development of his property in accordance with OLDSMAR's Zoning Ordinance.

37. After ROOD's applications for approval of the proposed Shopping Center were denied by OLDSMAR, ROOD retained McLAUGHLIN to determine if an amendment to the OLDSMAR Comprehensive Plan could be obtained.

III.C. THE DEVELOPMENT AGREEMENT

38. After ROOD pre-purchased sewage capacity, based on his then existing Zoning Districts of C-2 and R.P.D. 7.5, and while ROOD and COLLEN were continuing their discussions with OLDSMAR with respect to amending OLDSMAR's alleged Comprehensive Plan to make it consistent with the Zoning Ordinance, OLDSMAR, through its City Manager, Bruce Haddock (hereinafter "HADDOCK") suggested to ROOD and COLLEN that they combine their respective properties into a single development.

39. During the negotiations which lead up to the original Development Agreement, Defendant AGER offered his services to ROOD, COLLEN and McLAUGHLIN as an advisor with respect to negotiations with the members of the OLDSMAR City Council.

40. AGER was to be compensated a reasonable amount, to be determined by the parties, if a Development Agreement were approved and consummated.

41. After extensive negotiations amongst the parties, the terms and conditions of a Development Agreement were agreed upon by the parties and

ratified by the City Council on May 5, 1987. The Development Agreement is found as Exhibit G, attached to the Third Amended Complaint herein and made a part hereof by reference. [1]

42. The Development Agreement provides that it shall run and exist for the statutorily permitted five years, *i.e.*, until February 4, 1993.

III.D. THE DEVELOPMENT AGREEMENT STATUS

43. Notwithstanding the requirement of ¶ 6 of the Development Agreement, that the Agreement automatically terminate upon the preclusion of its fulfillment by the P.P.C., ROOD and OLDSMAR, on the failure of Pinellas County to approve a collector road through ROOD's property, sought to negotiate different solutions to the problems of the proposed development created by OLDSMAR's planning controls which existed prior to the adoption of the Development Agreement.

44. ROOD and OLDSMAR ultimately

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[1] Pursuant to O.R. Book 6830, Page 913, this Exhibit is attached as it is found in the Public Records of Pinellas County, except that a small scale version of Exhibit C to the Original Development Agreement is also attached. For ease of reference, Exhibit C to the Development Agreement (Exhibit G hereto,) will hereafter be referred to as the "Site Plan".

found a new solution but were unable to secure the approval of that solution by COLLEN, see, *e.g.*, Exhibit J, attached to the Third Amended Complaint herein and made a part hereof by reference.

45. On March 20, 1990 OLDSMAR executed an amendment to the Development Agreement, which was executed by ROOD on May 23, 1990 (Exhibit K, attached to the Third Amended Complaint herein and made a part hereof by reference).

46. OLDSMAR recorded the original Development Agreement in the Public Records of Pinellas County, and, on August 9, 1991, recorded the unsigned amendment in the Pinellas County Public Records, in Official Records Book 7648, Page 1914.

47. Further, efforts to secure developers/purchasers to undertake the development of the property or to find lenders to finance such development have been unsuccessful.

48. Because Defendants, subsequent to the inability of the parties to secure approval of a collector road through ROOD's property, have failed and refused to approve any plan for the economically beneficial development of Plaintiffs'

property, the property has not been marketable to developers or lenders, even though ROOD has, since approximately June 1990, negotiated in good faith with Defendants OLDSMAR and STASZKO to reach agreement on an actual amendment to the Agreement that would be marketable.

49. In the course of these efforts, ROOD has expended considerable time, money and effort.

50. Although ROOD has consistently sought to reach agreement on an actual amendment to the marketable site plan approved in the original Development Agreement, Defendants, OLDSMAR, PINTA and STASZKO, have delayed and obfuscated the process, and have failed and refused to approve workable, mutually beneficial plans that represent sound and marketable urban design, consistency with the Comprehensive Plan, and good development.

51. The actions of OLDSMAR, STASZKO and PINTA complained of herein include, by way of example and not limitation:

a) Refusal of STASZKO to allow the Florida Department of Transportation to exercise its lawful jurisdiction with respect to driveway permits on S.R. 584;

b) Rejection of the best plans for the development on, *inter alia*, the following dates:
   i) August 18, 1992;
   ii) February 18, 1992; and
   iii) March 5, 1991.

c) Or the approval of site plans but with such numerous and onerous conditions (approximately 15 in number) that the changes required were arbitrary and capricious and therefore took all economically beneficial use of Plaintiffs' property;

d) Imposition of development requirements which made the development cost prohibitive;

e) causing enumerable, unwarranted delays in processing development plans;

f) requiring that the golf course part of the development be fully constructed and operating prior to the construction and occupancy of other parts of the

development.

thereby acting arbitrarily and capriciously and taking from Plaintiffs all economically beneficial use of their property, and destroying Plaintiffs' reasonable investment-backed expectations.

52. The parties, ROOD, McLAUGHLIN, as successor to COLLEN, and OLDSMAR, have not reached agreement on amendments to the original Development Agreement and thus are bound by the original Development Agreement, which is the only agreement amongst them, but which has become invalid through the expiration of its five year period of existence.

53. Thus, fulfillment of the terms and conditions of the original Development Agreement has been precluded by the inability of the parties to fulfill its terms and conditions within its five year period of validity.

54. Proof of the inability of the parties to fulfill the original Development Agreement is found in the execution, by OLDSMAR, of an amendment to the original agreement.

55. Therefore, the original Development Agreement has become invalid through the operation of time. The parties have not met, conferred and

reached agreement on an extension of the Agreement, and the parties are thus required to restore each other to their pre-agreement positions.

56. ROOD and McLAUGHLIN have declared the Development Agreement to be terminated and have requested a refund of funds paid pursuant to the Agreement and that the parties otherwise restore each other to their pre-agreement positions. (Exhibit L, attached to the Third Amended Complaint herein and made a part hereof by reference.)

57. OLDSMAR has refused to refund the monies at issue to ROOD. (Exhibit M, attached to the Third Amended Complaint herein and made a part hereof by reference.)

58. On the completion of this action, Plaintiffs expect that this Honorable Court will declare the Original Development Agreement to have become invalid by operation of time, and the Amended Development Agreement to be null and void. Plaintiffs further expect that the Comprehensive Plan designations applicable to their properties will also be quashed, leaving a final development approval pursuant to the 1982 Zoning Districts applicable to the property.

B. DECLARATORY JUDGMENT AGAINST AGER

59. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 58, *supra*, inclusive, as if fully set out herein.

60. This is an action for Declaratory Judgment pursuant to Chapter 86, Florida Statutes.

61. Defendant AGER asserts a claim against ROOD and against McLAUGHLIN's real property for his services related to the original Development Agreement.

62. ROOD and McLAUGHLIN's predecessor, COLLEN, agreed to compensate AGER for his services if two conditions precedent were met:

a) That agreement were reached between ROOD, COLLEN and OLDSMAR; and

b) That the agreement were actually consummated by the development of the ROOD and McLAUGHLIN properties in accordance with the Agreement.

63. The first condition precedent has been fulfilled, but the second condition precedent, the

consummation of the agreement, has not and cannot be fulfilled.

64. Plaintiffs herein do not challenge AGER's claims against COLLEN or AGER's claims related to services performed in the physical maintenance of COLLEN's property.

65. A dispute exists between Plaintiffs ROOD and McLAUGHLIN and Defendant AGER with respect to the obligation, if any, of Plaintiffs to AGER.

66. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, if any, to Defendant AGER.

WHEREFORE, Plaintiffs demand judgment against Defendant AGER, as follows:

a) A judgment by the Court determining Plaintiff's obligations, if any, to Defendant AGER with respect to his services related to the original Development Agreement, and declaring that Plaintiffs ROOD and McLAUGHLIN have no obligation to Defendant AGER for services performed related to the original Development Agreement.

b) A judgment awarding Plaintiffs

their costs and such other relief as the Court deems just and proper.

C. DECLARATORY AND INJUNCTIVE RELIEF AGAINST DEFENDANT OLDSMAR

67. Counts I through IV, inclusive, hereof, are an action for Declaratory Relief pursuant to Chapter 86, Florida Statutes.

68. Counts I through IV, inclusive, hereof, are also an action for Injunctive Relief pursuant to § 26.012 (3), F.S.

COUNT I
SEWAGE CAPACITY SALE
UNLAWFUL AMENDMENT OF AN ORDINANCE

69. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 58, *supra*, inclusive, as if fully set out herein.

70. At the time ROOD was making his application to OLDSMAR for approval of the proposed Shopping Center, OLDSMAR had a significant shortage of capacity in its Sewage Treatment Plant, and had no funds available to cure said shortage.

71. At that time, prior to the adoption of Resolution 86-14, connections to the OLDSMAR sewage system, and sewer impact fees were governed by OLDSMAR **Ordinance** 85-37, Exhibit C, attached to the Third Amended Complaint herein and made a part hereof by reference.

72. On May 20, 1986, OLDSMAR adopted **Resolution** 86-14, (Exhibit D, attached to the Third Amended Complaint herein and made a part hereof by reference,) establishing a method by which sewage capacity would be sold, sewer impact fees pre-paid, and funding for an expansion to the Sewage Treatment Plant thereby obtained.

73. Resolution 86-14 amended Ordinance 85-37.

74. ROOD's payment to OLDSMAR was made pursuant to a contract, (Exhibit F,) purportedly authorized by Resolution 86-14.

75. The sum of $715,000 was calculated for ROOD by McLAUGHLIN and others, based on the sewage generated by development in accordance with the Zoning Ordinance.

76. In the sale of sewage capacity, OLDSMAR hoped to sell all (except for a reservation for "small projects", not applicable to

ROOD or McLAUGHLIN's properties) of the capacity of the proposed expansion of the Sewage Treatment Plant which, if the sale of all capacity had occurred, would have prevented any major development in OLDSMAR, except by those who had purchased sewage capacity, for the foreseeable future.

77. ROOD purchased sewage capacity because OLDSMAR had already placed so many obstacles in the path of his proposed development, that if all of the sewage capacity were sold in the sale, the additional delay in the development of his property would have destroyed all value of his property.

78. Although Resolution 86-14, on its face, alleges its consistency with Ordinance 85-37, the Resolution is, in fact, inconsistent, and is a *de facto* and *de jure* amendment to the Ordinance in the following substantial and material ways:

a) Ordinance 85-37 provides for the payment of impact fees at times certain in the building process; Resolution 86-14 requires the payment of impact fees at 12:00 noon on June 27, 1986;

b) As an alternative to the payment of impact fees during the building process, Ordinance 85-37, itself, provides a mechanism for an advance reservation of sewage capacity, with payments made pursuant thereto being refundable; Resolution 86-14 provides that reservation fees are non-refundable;

c) Ordinance 85-37 makes no provision for the availability of water and sewer service to "small" projects; Resolution 86-14 sets aside 25% of the City's available water and sewer capacity for "small projects";

d) Ordinance 85-37 provides that sewage capacity reserved may be used anywhere in the City's sewer service area; Resolution 86-14 limits the use of reserved capacity to property precisely defined in the reservation.

79. Therefore, and notwithstanding the

allegation on the face of Resolution 86-14 that it is consistent with Ordinance 85-37, the Resolution is inconsistent and actually and unlawfully amends the Ordinance. Therefore, Resolution 86-14 must be declared null and void.

80. A dispute exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR with respect to the validity of Resolution 86-14.

81. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, pursuant to Resolution 86-14.

82. McLAUGHLIN, not having been a party to any of the previous transactions related to Ordinance 85-37 and Resolution 86-14, is in extreme doubt about his rights, privileges, immunities and obligations pursuant to these legislative acts of OLDSMAR.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court declaring that Defendant OLDSMAR improperly attempted to amend Ordinance 85-37 by Resolution 86-14, and that OLDSMAR Resolution 86-14 is null

and void *ab initio*, and without any force or effect whatsoever;

b) Entering a prohibitory injunction prohibiting Defendant OLDSMAR and all others acting on behalf of, in privity with, or in conjunction with OLDSMAR from enforcing or attempting to enforce the provisions of Resolution 86-14;

c) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT II
THE DEVELOPMENT AGREEMENT AMENDMENT

83. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 58, *supra*, inclusive, as if fully set out herein.

84. Only one Development Agreement, without amendment, exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR.

85. Instead of agreeing to the automatic termination of the original Development Agreement (as set out in Count III of the Third Amended Complaint, or that the Agreement has become invalid through the operation of time {Counts IV and VI, *infra*}), OLDSMAR is attempting to enforce a

purported amendment to the Development Agreement which was executed by ROOD and OLDSMAR but which was never executed on behalf of McLAUGHLIN's predecessor COLLEN and which does not bind McLAUGHLIN.

86. Further, the Development Agreement Amendment was established in the course of the following chronology:

a) **March 8, 1990**, McLAUGHLIN begins action against COLLEN, Case No. 90-4133, *Lis Pendens* filed, O.R. Book 7219, Page 304;

b) **March 20, 1990**, "Amended" Development Agreement executed by City;

c) **May 23, 1990**, "Amended" Development Agreement executed by ROOD;

d) **October 17, 1990**, COLLEN executes deed of his property to ROOD;

e) **August 9, 1991**, Oldsmar records "Amended" Development Agreement;

f) **August 15, 1991**, ROOD records

deed.

g) **May 22, 1992**, Supplemental Final Judgment entered in McLAUGHLIN v. COLLEN; ¶ 13 provides:

> On filing of the Certificate of Title, the Defendant, KEITH R. COLLEN and all persons claiming under or against said Defendant since the filing of McLAUGHLIN's Notice of Lis Pendens, shall be foreclosed of all estate or claim in the real property hereinbefore described ..." (Exhibit N, attached to the Third Amended Complaint herein and made a part hereof by reference.)

87. Therefore, both the Development Agreement Amendment and COLLEN's deed to ROOD are foreclosed by the final judgment for McLAUGHLIN and his previous Notice of *Lis Pendens*.

88. Thus, at law and in equity, the Development Agreement Amendment is a nullity.

89. A dispute exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR with respect to the status of the Development Agreement Amendment and with respect to the obligations of the parties thereunder.

90. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, pursuant to the Development Agreement Amendment.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court declaring that the Development Agreement Amendment has been foreclosed by McLAUGHLIN's foreclosure of COLLEN's property and is therefore a nullity;

b) Entering a judgment by the Court declaring that if there is any controlling Development Agreement between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR, it is the original agreement, recorded in Official Records Book 6825, Page 1563, and re-recorded in Official Records Book 6830, Page 897, Public Records of Pinellas County, Florida and that there is no valid and binding amendment to said agreement;

c) Entering a prohibitory injunction prohibiting Defendant OLDSMAR and all others acting on behalf of, in privity with, or in conjunction with OLDSMAR from enforcing or attempting to enforce the provisions of any Development Agreement Amendment applicable to ROOD and McLAUGHLIN's properties;

d) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT III
THE COMPREHENSIVE PLAN DESIGNATIONS

91. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 58, *supra*, inclusive, as if fully set out herein.

92. Prior to the adoption by OLDSMAR of its Comprehensive Plan, (on December 16, 1980), the City had no Comprehensive Plan and Plaintiffs' property was governed solely by the OLDSMAR Zoning Ordinance.

93. The OLDSMAR Zoning Ordinance adopted on October 10, 1972, zoned ROOD's property Residential Planned Development 7.5 units per acre on the Southern approximately 85 acres;

and General Commercial on the Northern approximately 15 acres, adjacent to S.R. 584.

94. The same OLDSMAR Zoning Ordinance zoned McLAUGHLIN's property Residential Planned Development 7.5 units per acre on the Southern approximately 27 acres; and General Commercial on the Northern approximately 8 acres, adjacent to S.R. 584.

95. Plaintiff ROOD and McLAUGHLIN's predecessor COLLEN, purchased their property based on its reasonable Zoning Districts, without reference to the Comprehensive Plan.

96. In December, 1980, when OLDSMAR was required by Chapter 163, Florida Statutes 1979 to purportedly adopt a Comprehensive Plan, it elected to simply but unlawfully mimic (*i.e.*, copy verbatim,) the Future Land Use designations of the Pinellas County Planning Council (P.P.C.) Comprehensive Plan.

97. The P.P.C. was subsequently declared to be unconstitutional and to have improperly adopted its Comprehensive Plan.

98. The P.P.C. designations of Urban Low Density Residential on ROOD's property and Open Space on the COLLEN/McLAUGHLIN property did

not take into account the adjacent major arterial road, State Road (S.R.) 584, the intensive commercial development along S.R. 584, and the moderate industrial development to the North of the Plaintiffs' properties, across S.R. 584.

99. The designations of ROOD and McLAUGHLIN's properties in the P.P.C. Plan, mimicked in the OLDSMAR Comprehensive Plan, are arbitrary and capricious, not rationally related to a legitimate public purpose, work a taking of all economically beneficial use of Plaintiffs' property, and destroy Plaintiffs' reasonable investment backed expectations.

100. The Open Space designation on the COLLEN/McLAUGHLIN prohibited all economically beneficial use of all the property, was arbitrary and capricious, not rationally related to the legitimate exercise of the police power, and worked a taking of all beneficial use of the property. The designation also destroyed the owners' reasonable, investment-backed expectations.

101. Arbitrary and capricious land use regulations are unconstitutional in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

102. As the parties are required to restore each other to their pre-Development Agreement positions, these designations will again apply to Plaintiffs' properties.

103. In contrast, the Zoning Districts applicable to Plaintiffs' property were carefully established by OLDSMAR after thorough study of the area and the properties, are reasonable and appropriate, and permit economically beneficial use of ROOD and McLAUGHLIN's properties.

104. McLAUGHLIN has never conceded that the original Comprehensive Plan designations applicable to Plaintiffs' real property were reasonable and appropriate.

105. ROOD's alleged admission that the land use designations on his property were reasonable and appropriate is immaterial because the same alleged admission also stated that the conflicting Zoning Districts governing ROOD's land were reasonable and appropriate.

106. The only marketable site plans available to Plaintiffs are those pursuant to the 1985 Zoning Districts and that attached to the now invalid original Development Agreement.

107. ROOD having applied unsuccessfully

for Comprehensive Plan Amendments in 1985, Plaintiffs have exhausted their administrative remedies.

108. Further, any future efforts to resolve the Comprehensive Plan by pursuing administrative remedies with Defendant OLDSMAR would patently be futile, and thus these alleged remedies need not be pursued. Further, the proposed site plans rejected by OLDSMAR as described in ¶ 51 b), *supra*, required amendments to the Comprehensive Plan, and thus Plaintiffs have also exhausted these alleged administrative remedies.

109. A dispute exists between Plaintiffs ROOD and McLAUGHLIN and Defendant OLDSMAR with respect to the application of the Pinellas County Planning Council Comprehensive Plan, as mimicked in the OLDSMAR Comprehensive Plan, to Plaintiffs' lands.

110. Plaintiffs ROOD and McLAUGHLIN are in doubt as to their obligations, pursuant to the OLDSMAR Comprehensive Plan.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court

declaring that the OLDSMAR Comprehensive Plan unlawfully mimicked the invalid Pinellas County Planning Council Comprehensive Plan, and that the designations of the Comprehensive Plan applicable to Plaintiffs' properties are arbitrary and capricious, without a rational relationship to the legitimate exercise of the police power, and work a taking of all economically beneficial use of Plaintiffs' property;

b) Entering a judgment by the Court declaring that the Zoning Districts previously established by OLDSMAR on Plaintiffs' property are correct and reasonable, and should govern in place of the Comprehensive Plan designations;

c) Entering a prohibitory injunction prohibiting Defendant OLDSMAR and all others acting on behalf of, in privity with, or in conjunction with OLDSMAR from enforcing or attempting to enforce the provisions of the OLDSMAR Comprehensive Plan with respect to ROOD and McLAUGHLIN's properties;

d) Entering a mandatory injunction requiring Defendant OLDSMAR to amend its Comprehensive Plan to make it consistent with the Zoning Districts applicable to Plaintiffs' properties,

and to vigorously seek the approval of this amendment from all agencies with jurisdiction;

e) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT IV
REFUSAL TO TERMINATE DEVELOPMENT AGREEMENT AND REFUND FEES [2]

111. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 58, *supra*, inclusive, as if fully set out herein.

112. As set out in ¶ 2 on page 899 of the original Development Agreement (Exhibit G, hereto,) the Development Agreement is "valid for a period of five (5) years from the date that it is executed by all parties."

113. The original Development Agreement was executed by all parties on February 4, 1988.

114. Five years have now run since the execution of the original Development Agreement,

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[2] The period of validity of the original Development Agreement ran for five years from February 4, 1988. At the time this action was commenced, the original Development Agreement had **not** become invalid through the operation of time. Time has now operated to make the original Development Agreement, and this is Plaintiffs' first proper opportunity to raise this issue and count.

and the original Development Agreement is thus, by its own terms, no longer valid.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court declaring that the original (1988) Development Agreement is no longer valid by operation of time and the terms of the Agreement and that there is no valid and binding Development Agreement between the parties;

b) Entering a prohibitory injunction prohibiting Defendant OLDSMAR and all others acting on behalf of, in privity with, or in conjunction with OLDSMAR from enforcing or attempting to enforce the provisions of any Development Agreement applicable to ROOD and McLAUGHLIN's properties;

c) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

D. COMPLAINT FOR RECISION OF CONTRACT
COUNT V
SEWAGE CAPACITY SALE
UNLAWFUL RESOLUTION

115. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 58, *supra*, inclusive, as if fully set out herein.

116. This is an action to rescind a contract, which contract is found as Exhibit F to the Third Amended Complaint herein, incorporated herein by reference, and evidencing an obligation in excess of $15,000.

117. On May 20, 1986, OLDSMAR enacted Resolution 86-14, which purportedly permitted OLDSMAR to enter into contracts for the sale of sewage treatment capacity, pursuant to the terms of the Resolution.

118. ROOD and OLDSMAR executed a contract (Exhibit F hereto) pursuant to Resolution 86-14.

119. ROOD paid OLDSMAR the sum of $715,000, pursuant to the contract.

120. Prior to the adoption of Resolution 86-14 the purchase and allocation of sewage capacity in

OLDSMAR was governed by Ordinance 85-37.

121. Resolution 86-14 purported to amend Ordinance 85-37.

122. Under Florida law, an Ordinance may not be amended except by another Ordinance. In particular, an Ordinance may not be amended by a resolution.

123. Although Resolution 86-14 alleges, on its face, its consistency with Ordinance 85-37, the Resolution is, in fact, inconsistent, and is a *de facto* and *de jure* amendment to the Ordinance in the following substantial and material ways:

a) Ordinance 85-37 provides for the payment of impact fees at times certain in the building process; Resolution 86-14 requires the payment of impact fees at 12:00 noon on June 27, 1986;

b) As an alternative to the payment of impact fees during the building process, Ordinance 85-37, itself, provides a mechanism for an advance reservation of sewage capacity, with payments made pursuant thereto being

refundable; Resolution 86-14 provides that reservation fees are non-refundable;

c) Ordinance 85-37 makes no provision for the availability of water and sewer service to "small" projects; Resolution 86-14 sets aside 25% of the City's available water and sewer capacity for "small projects";

d) Ordinance 85-37 provides that sewage capacity reserved may be used anywhere in the City's sewer service area; Resolution 86-14 limits the use of reserved capacity to property precisely defined in the reservation.

124. Therefore, and notwithstanding the allegation on the face of Resolution 86-14 that it is consistent with Ordinance 85-37, the Resolution is inconsistent and actually and unlawfully amends the Ordinance, and, thus there is no repugnancy between this Complaint and Exhibit D.

125. Therefore, OLDSMAR was without legal authority to enter into the contract with ROOD,

and the contract is null and void, and without any force or effect whatsoever.

126. In the procedures used by Defendant OLDSMAR in the sewage capacity sale, OLDSMAR knowingly and unlawfully entered into a contract (Exhibit F hereto) with ROOD, with said contract being provided for and set forth in Resolution 86-14, which unlawfully amended Ordinance 85-37.

127. As a contract authorized by unlawful means, the contract between ROOD and OLDSMAR for the purchase of sewage treatment capacity is null and void *ab initio*, and must therefore be rescinded and OLDSMAR be required to return to ROOD the $715,000 which ROOD paid to OLDSMAR pursuant to the contract.

128. ROOD has demanded cancellation of the contract and refund of the funds paid pursuant thereto, but OLDSMAR has refused to cancel the contract and refund the monies paid pursuant thereto.

129. Plaintiffs have no adequate remedy at law because Plaintiff is presently required to leave with OLDSMAR funds which OLDSMAR obtained illegally and is not entitled to keep.

WHEREFORE, Plaintiffs demand judgment

against Defendant OLDSMAR, as follows:

a) Entering an Order by this Court rescinding the contract (Exhibit F) between ROOD and OLDSMAR and compelling OLDSMAR to return to ROOD the $715,000 which he paid pursuant to Exhibit F, together with pre-judgment interest, and declaring that ROOD has not pre-purchased sewage capacity.

b) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

E. COMPLAINT FOR DAMAGES
COUNT VI
REFUSAL TO TERMINATE DEVELOPMENT AGREEMENT AND REFUND FEES [3]

130. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 58, *supra*, inclusive, as if fully set out herein.

131. As set out in ¶ 2 on page 899 of the original Development Agreement (Exhibit G, hereto,)

---

[3] The period of validity of the original Development Agreement ran for five years from February 4, 1988. At the time this action was commenced, the original Development Agreement had **not** become invalid through the operation of time. Time has now operated to make the original Development Agreement, and this is Plaintiffs' first proper opportunity to raise this issue and count.

the Development Agreement is "valid for a period of five (5) years from the date that it is executed by all parties."

132. The original Development Agreement was executed by all parties on February 4, 1988.

133. Five years have now run since the execution of the original Development Agreement, and the original Development Agreement is thus, by its own terms, no longer valid.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Entering a judgment by the Court requiring OLDSMAR to repay to ROOD all monies he paid to the Development Agreement, together with pre-judgment interest, and requiring the parties to otherwise restore each other to their respective status prior to their entering the original Development Agreement;

b) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

COUNT VI
SLANDER OF TITLE

134. Plaintiffs re-allege and incorporate

herein, ¶¶ 1 through 58, *supra*, inclusive, as if fully set out herein.

135. This Count is pled as an alternative to Count II, *supra*, because if the Court finds that McLAUGHLIN's Notice of *Lis Pendens* forecloses the Development Agreement Amendment, then no Slander of Title will have occurred.

136. By the recording and maintaining of the Amended Development Agreement, which Agreement has never been executed to bind McLAUGHLIN or McLAUGHLIN's predecessor in title, Defendant has slandered the title of Plaintiffs' real property in that Defendant falsely and maliciously communicated to third parties a false idea about McLAUGHLIN's ownership of the subject real property.

137. Said slander has prevented Plaintiffs from freely dealing with the property, including refinancing the property, selling the property, or securing joint venture partners or merchant developers to develop the property.

138. Said slander has also caused Plaintiffs embarrassment and loss of reputation.

139. By the slandering the title of Plaintiffs' real property, Defendant OLDSMAR has damaged

Plaintiffs.

140. The damage inflicted on Plaintiffs by Defendant OLDSMAR was intentional, malicious, without any pretext whatsoever as being in fulfillment of a legitimate governmental purpose.

WHEREFORE, Plaintiffs demand judgment against Defendant OLDSMAR, as follows:

a) Awarding damages to ROOD and McLAUGHLIN in the actual amount of damages incurred by ROOD and McLAUGHLIN, together with pre-judgment interest and costs;

b) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

A jury trial is demanded for this Count.

COUNT VII
DELAY [4]

141. Plaintiffs re-allege and incorporate herein, ¶¶ 1 through 58, *supra*, inclusive, as if fully set out herein.

142. Procedural due process of law, required

---

[4] This Court has been dismissed as to Defendant OLDSMAR. However, neither Defendants PINTA nor STASZKO responded to Plaintiffs' Third Amended Complaint, and are in default therein. Accordingly, Plaintiffs include this Count as to the Individual Defendants only.

by the Fifth and Fourteenth Amendments to the Constitution of the United States, requires that applications to agencies acting under color of state law, be processed in an equitable fashion, without undue delay.

143. Procedural due process further requires that delays not be imposed for pretextual reasons or for improper motives.

144. Defendants PINTA and STASZKO, acting under color of state law, in causing delays by refusing to approve a reasonable use of Plaintiffs' property, which refusal was arbitrary, capricious, and not based on competent substantial evidence, in violation of 42 U.S.C. § 1983, denied Plaintiffs procedural due process of law, and therefore the economically beneficial use of their property.

145. The delays and refusal of Defendants to approve any reasonable development proposal for Plaintiffs' real property were pretextual in nature, and based on an improper motive.

146. The delays and refusal of Defendants to approve any reasonable development proposal for Plaintiffs' real property took, through the operation of the City's Land Development Regulations, all economically beneficial use of Plaintiffs' property

without compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and in violation of 42 U.S.C. § 1983 and of the Florida Constitution.

147. Said deprivation occurred beginning in April, 1990, and will continue until restitution is made.

148. Defendants' refusal to consider and approve a reasonable development plan for Plaintiffs' property was simply a pretext to stop, delay and/or minimize the yield of the development of Plaintiffs' land.

149. Defendant PINTA's actions were a pretext to assist his son in his proposed acquisition of the land now owned by McLAUGHLIN.

150. Defendants' delay and refusal to approve a reasonable development plan, further interfered with Plaintiffs' investment-backed expectations, arising from their analysis of the OLDSMAR Zoning Ordinance and of reasonable development potential of their properties.

151. Acting under color of state law, in open, notorious and repeated violation of the Fifth and Fourteenth Amendments to the Constitution of the

United, States, Defendants acted arbitrarily and capriciously, in delaying that approval of a reasonable development plan for Plaintiffs' property.

152. During the period when Defendants refused to approve a reasonable development plan for Plaintiffs' land, Plaintiffs, through the operation of OLDSMAR's Land Development Regulations, lost all economically beneficial use of their property.

153. During this period when Plaintiffs lost all economically beneficial use of their property, Plaintiffs lost opportunities to sell their property at a profit, were required to pay on-going expenses related to their property, and were denied the benefit of the profits from their property.

154. The actions of Defendants, all under color of state law deprived Plaintiffs of Procedural Due Process of Law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. Plaintiffs are entitled to an award of damages for these actions, under color of state law, of Defendants.

155. The damage inflicted on ROOD and McLAUGHLIN by PINTA and STASZKO was intentional, malicious, without any pretext whatsoever as being in fulfillment of a legitimate

governmental purpose.

WHEREFORE, Plaintiffs demand judgment against Defendants PINTA and STASZKO, as follows:

a) Awarding damages to ROOD and McLAUGHLIN in the actual amount of damages incurred by ROOD and McLAUGHLIN, together with pre-judgment interest and costs;

b) Awarding punitive damages to ROOD and McLAUGHLIN in an amount commensurate with the egregiousness of PINTA and STASZKO's actions, and with the PINTA and STASZKO's ability to pay;

c) Awarding Plaintiffs their costs and such other relief as the Court deems just and proper.

A jury trial is demanded for this Count.

Respectfully submitted,

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(813) 229-6591

R. Bruce McLaughlin,
Plaintiff, *pro se*
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I hereby certify that a true copy of the foregoing has been furnished to: Bryan Kutchins, Esq., P.O. Box 1063, Oldsmar, Fl., 34677, and to Eric Ager, 3375 Hunt Club Drive, Clearwater, Fl., 34621, by regular United States Mail, this _____ day of July, 1994.

R. Bruce McLaughlin

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA CIVIL DIVISION

E. B. ROOD and R. BRUCE McLAUGHLIN,
Plaintiffs

v. Case No. 92-92-3764 CI 07

THE CITY OF OLDSMAR, a Florida Municipal Corporation, THOMAS PINTA and NICK STASZKO, in their individual and personal capacities, and ERIC AGER
Defendants

/

LIST OF EXHIBITS

A. Legal Description, ROOD Property

B. Legal Description, McLAUGHLIN/COLLEN Property

C. Ordinance 85-37

D. Resolution 86-14

E. Objection to Sewage Capacity Sale

F. Contract Pursuant to Resolution 86-14

G. Development Agreement

H. Pinellas County Planning Council Resolution 90-4

I. ROOD/OLDSMAR Petition to the Florida Department of Community Affairs

J. Letter, Collen's Attorney to Oldsmar, 5/25/90, reflecting objections of Collen to Amended Development Agreement

K. Purported Amended Development Agreement

L. Demand for Termination of Development Agreement and Refund of Money

M. City's Refusal of Demand

N. Notice of *Lis Pendens* and Supplemental Final Judgment of Foreclosure, McLAUGHLIN v. COLLEN, case No. 90-4133-007

O. Executive Summary, Planning Feasibility Study, Rood/Collen Properties, May, 1987

P. Transportation Analysis, Collen/Rood

Properties, June, 1987

Q. Excerpt, West Oldsmar Plat

Supreme Court, U.S.
FILED
OCT 7 1996
CLERK

(2)

No. 96-359

In The

Supreme Court of the United States

October Term, 1996

E. B. ROOD and R. BRUCE MCLAUGHLIN,

Petitioners,

v.

THE CITY OF OLDSMAR, a Florida Municipal Corporation, and THOMAS PINTA and NICK STASZKO,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of The Second District Of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES

The Petitioners are E.B. Rood and R. Bruce McLaughlin.

The Respondent, City of Oldsmar, is correctly identified in Petitioners' caption except that Thomas Pinta and Nick Staszko, as defendants/appellees below, are also Respondents to this Petition.

Each of the Respondents join in this Brief in Opposition.

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STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. §1257(a) (1995). In addition to the untimeliness of this Petition, the Petition does not involve a judgment from the highest court in which a decision could be had and does not involve federal questions which were presented to and passed upon by the Florida courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no federal constitutional provisions, treaties, statutes, or regulations involved in this case. The sole issue determined by the Florida courts is whether the Petitioners stated a cause of action as a matter of state law.

STATEMENT OF THE CASE

Respondents agree, in general, with Petitioners' Statement of the Case except as follows. The Petition states that "[a]t all times material hereto, the lands of Rood and McLaughlin were zoned General Commercial and Residential Planned Development at 7.5 units per acre." (Petition at page 4). This statement is materially misleading and patently false.

Prior to the City of Oldsmar's adoption of its Comprehensive Plan in 1980, the subject properties were

zoned as Petitioners indicate. However, under the Comprehensive Plan the subject property was designated as Medium Density Residential (Rood) and Open Space (McLaughlin). (Petition at page 5). Petitioners admit that, under Florida law, the Comprehensive Plan superseded all previously adopted zoning ordinances. *Id.* Petitioner Rood acquired his portion of the property at issue in 1982 and Petitioner McLaughlin acquired his portion of the property involved in this case in 1992. Thus, at no time during the ownership of either Petitioner was the subject property zoned as Petitioners would suggest.

Furthermore, Respondents would supplement Petitioners' Statement of the Case as follows. It is unnecessary to enumerate the entire procedural history of Petitioners' suit against the Respondents. Suffice it to say the trial court dismissed with prejudice seven counts of Petitioners' Third Amended Complaint for failure to state a cause of action and let stand four counts from that Complaint. Petitioners appealed the dismissal of the seven counts from the Third Amended Complaint. Prior to resolution of that appeal, Petitioners attempted to comply with the Order of the trial court and filed a Fourth Amended Complaint. The trial court ultimately dismissed the Fourth Amended Complaint with prejudice, again on procedural grounds.

Based upon the procedural posture of the case, the Second District Court of Appeal affirmed in part and reversed in part the trial court's dismissal with prejudice

of the Fourth Amended Complaint. The instant Petition ensued.

ARGUMENT

The question presented for review in the Petition states as follows:

> Whether the District Court of Appeal failed to follow the mandate found in the Fifth and Fourteenth Amendments to the Constitution of the United States when it reinstated a declaratory judgment action seeking a declaration that comprehensive plan designations were arbitrary and capricious, without reinstating a companion action for damages?

The companion action for damages referenced by the Petition is found at Count IX of the Third Amended Complaint. (Petition at page 9). Thus, the sole issue presented by the Petition is the dismissal of Count IX of the Third Amended Complaint. *Id.* This Court, however, should decline to exercise its certiorari jurisdiction in the case for four reasons. First, the Petition was not timely filed. Second, the Petitioners failed to obtain a judgment from the highest state court in which a decision could be had. Third, the issues involved in this case do not involve a substantial federal question. Fourth, the state courts made their determinations based solely on state grounds.

I

The Petition For Writ Of Certiorari Was Not Timely Filed.

The Petition filed in this case correctly notes that, on July 26, 1996, Justice Kennedy extended the time for the filing of the Petition until September 4, 1996. (Petition at page 3). A Petition is timely filed when it has been mailed with first-class postage pre-paid, and bears a postmark showing the document was mailed on or before the last day for filing (Sup. Ct. R. 29.2). Attached to this response is a copy of the envelope sent to Respondents which contained the Petition. (Respondents' Appendix at A-1). The original envelope has been lodged with the court. It is clear, from the postmark on the envelope that the Petition was not mailed until September 6, 1996, two days late. Thus, the Petition was not timely filed and should be dismissed.

Furthermore, pursuant to 28 U.S.C. §2101(c) (1995), a Petition for Writ of Certiorari must be filed within ninety days from the entry of the order of the state appeals court. If timely requested, a sixty day extension of time to file the petition is available. Therefore, in no event may any Petition for Writ of Certiorari be filed more than one hundred and fifty days from the entry of the Order of the state appeals court.

In addition to the untimely filing of this Petition, the main point raised in the Petition was not properly preserved or timely filed. The crux of the Petition is that the District Court of Appeal erred in failing to reinstate Count IX of the Third Amended Complaint. (Petition at

pages 8-9). It is clear from the Petition, however, that the Petitioners waived their appeal of the dismissal of Count IX of the Third Amended Complaint when they filed a Fourth Amended Complaint.

In Florida, a party to an appeal loses his right to attack an alleged erroneous ruling when that party consents or acquiesces to the ruling. *Frank Silvestri Investments, Inc. v. Sullivan*, 486 So. 2d 20 (Fla. 5th DCA 1986) (appeal from final judgment of foreclosure mooted and, thus, abandoned when Appellant satisfied the judgment prior to resolution of appeal.); *Holmes v. School Board of Orange County*, 301 So. 2d 145 (Fla. 4th DCA 1974) (one may not assert error upon an action of the trial court in which he has acquiesced.)

On June 17, 1994, the trial court dismissed with prejudice, among other counts, Count IX of the Third Amended Complaint and rehearing was denied by the Court on June 29, 1994. Petitioners filed their Notice of Appeal on July 14, 1994 invoking the jurisdiction of the Second District Court of Appeals (hereinafter "2d DCA"). Subsequently, on July 19, 1994, Petitioners filed their Fourth Amended Complaint in an attempt to comply with the trial court's June 17th Order. The filing of the Fourth Amended Complaint was obvious acquiescence to the trial court's Order thereby waiving their appeal to the dismissal of the Third Amended Complaint.

After the trial court dismissed with prejudice the entire Fourth Amended Complaint, Petitioners filed with the 2d DCA an Amended Notice of Appeal. The Amended Notice of Appeal makes it clear that the Petitioners had waived and/or abandoned their original

appeal and now only sought review of the "Final Order of the Circuit Court Dismissing with Prejudice the Entire Fourth Amended Complaint. . . . " (Respondents' Appendix at A-2).

In addition, it is clear from the 2d DCA's decision that the issue decided by the Court was the dismissal of the Fourth Amended Complaint. In its opinion, after giving a brief history of the case, the 2d DCA determined that dismissal with prejudice of the entire Fourth Amended Complaint was in error. (Petitioners' Appendix at A-11). As the Court stated:

> We therefore reverse the dismissal with prejudice of Counts I, II, III and VI of appellants' fourth amended complaint (Counts I, III, V and XI of the second amended complaint and Counts I, II, IV and XIII of the third amended complaint). We otherwise affirm the dismissal of appellants' fourth amended complaint.

(Petitioners' Appendix at A-12 through A-13). The only reason the court specified the counts it was reinstating in each amended complaint was to eliminate confusion as to the exact counts being reinstated. (Petitioners' Appendix at A-5). Therefore, the Appeals Court made no ruling as to the Third Amended Complaint but confined its decision to the Fourth Amended Complaint.

With regard to Count IX of the Third Amended Complaint, the time for Petitioners to have appealed to this Court began to run on July 19, 1994 when Petitioners filed their Fourth Amended Complaint. Well over one hundred and fifty days elapsed between the abandonment of that appeal and the instigation of the instant Petition. The Petition, insofar as it is premised upon Count IX of the

Third Amended Complaint, is clearly untimely and should be dismissed.

II

The Petitioners Have Failed To Obtain A Decision From The Highest Available State Court

This Court's certiorari jurisdiction is governed by 28 U.S.C. §1257(a) (1995). Pursuant to that section, "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . . " In Florida, a party aggrieved by a final order of a circuit court may, as a matter of right, appeal to the appropriate District Court of Appeal. Fla. Const. Art. V §4; Fla. R. App. P. 9.030(b)(1)(A).

As noted above, the Petitioners abandoned their appeal of the dismissal of Count IX of the Third Amended Complaint when they filed a Fourth Amended Complaint. As a result, the 2d DCA never ruled on the dismissal of said Count IX and the Petitioner never obtained a decision from the highest state court in which a decision could be had. Consequently, this Court lacks certiorari jurisdiction and the Petition should be dismissed. *See Southern Electric Co. v. Stoddard*, 269 U.S. 186.

III

The Petition In This Case Does Not Involve A Federal Question.

It is a basic premise of Supreme Court certiorari jurisprudence that an appeal from a state court must involve an important federal question. *Bankers Life and Casualty v. Crenshaw*, 486 U.S. 71 (1988); *Bowe v. Scott*, 233 U.S. 658 (1913); *National Foundry and Pipeworks, Ltd. v. Oconto City Water Supply Co.*, 183 U.S. 216 (1901). Correspondingly, a Petition for Writ of Certiorari must contain in the Statement of the Case, the exact stage in the proceedings, both in the court of first instance and in the appellate court, in which the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed upon by the court, so as to show that the federal question was timely and properly raised. (Sup. Ct. R. 14.1(g)(i)). Petitioners have failed to include these important requirements in their Petition.

In the instant case, no such important federal question is involved. The Petition is focused on the proposition that persons whose property has been temporarily taken by a governmental entity are entitled to compensation. The Respondents have no argument with that basic premise and no Court involved in this case has ruled to the contrary.

As noted above, the sole issue is the dismissal of Count IX from the Third Amended Complaint. The trial court dismissed Count IX with prejudice for the simple reason that the Petitioners could not, after four attempts, state a cause of action for a temporary taking. The trial

court never considered the merits of the case because of fatal repugnancies existing between the pleadings and the attached exhibits. (Petitioners' Appendix at A-21). In a similar fashion, the appeals court stated as follows:

> Since the Appeal may be disposed of *on procedural grounds*, we need not relate the rather complicated facts set forth by Appellants *in their attempt to allege a cause of action* against Oldsmar. (Emphasis supplied).

(Petitioners' Appendix at A-8). Therefore, the only rulings by any Court in this case are on matters of practice and procedure. It has long been the rule that whether pleadings state a cause of action is merely a question of practice and procedure and presents no federal question. *National Foundry, supra,* 183 U.S. at 237; *see also Benz v. New York State Thruway Authority,* 369 U.S. 147 (1962) (matters relating to the jurisdiction of state courts presents no federal question). In the absence of a federal question, the Court is without jurisdiction and the Petition should be dismissed.

IV

The Decisions Of The State Courts Rested Solely On Adequate And Independent State Grounds

In the event the Court should decide that the Petition involves a federal question, the decisions of the state courts rest solely on adequate and independent state grounds. Those decisions do not involve, in any way, the interpretation of any federal statute, federal right or privilege, or the U.S. Constitution.

The standard for whether a state court opinion rests on adequate and independent state grounds was enunciated in *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long*, this Court stated that certiorari jurisdiction attached when:

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion. . . .

Long, 463 U.S. at 1040-1041. The standard adopted in *Long* was recently reaffirmed by this Court's decision in *Arizona v. Evans*, 131 L. Ed. 2d 34 (1995).

In the case at bar, it is quite clear from the face of both the trial court and appellate court opinions that their decisions were based solely on state grounds. Assuming, for the purposes of argument only, that the dismissal of the Third Amended Complaint is properly before this Court, the trial court's decision to dismiss was based entirely upon fatal repugnancies between the Complaint and the attached exhibits. (Petitioners' Appendix at A-21). Because of those repugnancies, Petitioners failed, as a matter of state law, to state a cause of action. The trial court cited two state cases, *Namon v. State Department of Environmental Regulation*, 558 So. 2d 504 (Fla. 3d DCA 1990) and *Franz Tractor Co. v. J.I. Case Co.*, 566 So. 2d 524 (Fla. 2d DCA 1990), in support of its decision. (Petitioners' Appendix at A-21 through A-24). At no point in its decision did the trial court cite or allude to any federal law or authority.

In a similar fashion, the appellate court rested its decision entirely "on procedural grounds", which are

matters of state law. (Petitioners' Appendix at A-8, A-11 through A-12). Again, the appellate court neither cited nor alluded to any federal law or authority. Thus, even assuming that the Petition includes a federal question, both the trial and appellate court decisions were based entirely upon state grounds and this Court should decline to exercise jurisdiction.

CONCLUSION

The Petition filed in this case was untimely for two reasons. First, the Petition itself was not filed within the time period prescribed. Second, it is clear from the Petition that Petitioners abandoned their appeal of the dismissal of the Third Amended Complaint in July, 1994 and that the Fourth Amended Complaint contains no claim for damages against Respondents for the allegedly arbitrary and capricious comprehensive plan. This Petition was not initiated until April, 1996. Therefore, the issues raised by the Petition are untimely and the Court should decline to exercise its jurisdiction.

Furthermore, having abandoned their appeal of the Third Amended Complaint, the Petitioners failed to obtain a judgment from the highest state court in which a decision could be had. Finally, the Petition does not involve any federal questions. Rather, under the posture of this case, the issue is one of purely state law; whether the Petitioners stated a cause of action. As such, no federal question was ever pressed by the Petitioners, nor

was any federal question passed upon by the state courts. Therefore, the Court should decline to exercise its jurisdiction in this case and the Petition should be dismissed.

Respectfully Submitted,

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BEST AVAILABLE COPY

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA CIVIL DIVISION

E. B. ROOD and R. BRUCE McLAUGHLIN,

Plaintiffs

v.

Case No. 92-3764 CI 7

THE CITY OF OLDSMAR, a Florida Municipal Corporation, THOMAS PINTA and NICK STASZKO, in their individual and personal capacities, and ERIC AGER

Defendants

_____/

AMENDED NOTICE OF APPEAL

NOTICE IS GIVEN that Plaintiffs/Appellants, E. B. ROOD and R. BRUCE McLAUGHLIN, appeal to the Second District Court of Appeal, the final Order of the Circuit Court Dismissing with Prejudice the entire Fourth Amended Complaint rendered the 20th day of October, 1994. A conformed copy of the Order is attached. The nature of the Order is a final order Dismissing with Prejudice the Fourth Amended Complaint herein.

Respectfully submitted,

/s/ E. B. Rood
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Tampa, Fl., 33602
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/s/ R. Bruce McLaughlin
R. Bruce McLaughlin,
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I hereby certify that a true copy of the foregoing has been furnished by regular United States Mail to: Bryan Kutchins, Esq., P.O. Box 1063, 1000 State Road 584, Oldsmar, Fl., 34677, and to Eric Ager, 3375 Hunt Club Drive, Clearwater, Fl., 34621, this 29 day of October, 1994.

/s/ E. B. Rood
E. B. Rood

Supreme Court, U.S.
FILED
OCT 21 1996
CLERK

No. 96-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

E. B. Rood and
R. Bruce McLaughlin, *Petitioners*,
v.
The City of Oldsmar, a Florida
Municipal Corporation, *Respondent*.

On Petition for a Writ of Certiorari to the
District Court of Appeal
of the Second District of Florida

PETITION FOR A WRIT OF CERTIORARI
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QUESTION PRESENTED FOR REVIEW

1. Whether the District Court of Appeal failed to follow the mandate found in the Fifth and Fourteenth Amendments to the Constitution of the United States when it reinstated a Declaratory Judgment action seeking a declaration that Comprehensive Plan designations were arbitrary and capricious, without reinstating a companion action for damages?

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No. 96-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

E. B. Rood and
R. Bruce McLaughlin, *Petitioners,*

v.

The City of Oldsmar, a Florida
Municipal Corporation, *Respondent.*

On Petition for a Writ of Certiorari to the
District Court of Appeal
of the Second District of Florida

PETITION FOR A WRIT OF CERTIORARI REPLY BRIEF

E. B. Rood and R. Bruce McLaughlin respectfully submit this their Reply Brief in support of their Petition for Writ of Certiorari. Respondent, City of Oldsmar, has raised several new issues in its Brief in Opposition, and Petitioners reply to these new issues.

Interestingly, the City does not address the merits of the Petition. It does not because it cannot. There is no question that, as a matter of Constitutional law, the Second District Court of Appeal erred in reinstating the count seeking a Declaratory Judgment that the City's Comprehensive Plan was arbitrary and capricious, without reinstating the companion damage count.

As to the new issues raised by the City, Petitioner would respectfully comment as follows.

JURISDICTION

This Honorable Court does have jurisdiction pursuant to 28 U.S.C. § 1257(a). As set out below, all prerequisites to this Court's jurisdiction have been performed or have occurred.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners properly cited (Petition at 3 - 4) the

applicable Federal Constitutional and statutory provisions. In the Third and Fourth Amended Complaints before the Trial Court, Petitioners invoked that Court's jurisdiction pursuant to 42 U.S.C. § 1983 and to the Fifth and Fourteenth Amendments to the Constitution of the United States. See, with respect to the issue before this Court, Appendix at A-33, ¶¶ 4, 5 and 6, A-36; ¶ 15; A-82, ¶ 173; A-105, ¶ 248; A-106-107, ¶¶ 257 and 258; A-108-109, ¶ 263; (third amended complaint;) and A-124-125, ¶¶ 4, 5 and 6; A-128, ¶ 15; A-153, ¶ 101 (Fourth Amended Complaint).

Therefore, Petitioners properly pled, **before the Trial Court** and ever since, the relevant and applicable Federal Constitutional and Statutory provisions. In a mandate to the same District Court of Appeal, this Court held [1] that the state courts have concurrent jurisdiction over actions brought under 42 U.S.C. § 1983. Therefore, these Federal Constitutional and statutory challenges were properly before the Courts throughout this matter.

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[1] *Howlett v. Rose*, 496 U.S. 356, (1990)

STATEMENT OF THE CASE

The parties are generally in accord with respect to the facts before the Trial Court. While the City is correct that the Comprehensive Plan supersedes the Zoning Ordinance, the fact remains that Petitioners' properties were zoned as set forth (Petition at 4 - 5) and that there was, therefore, a conflict between the Comprehensive Plan and the Zoning Ordinance.

The City was required [2] to make its Comprehensive Plan and Zoning Ordinance consistent with one another, but it failed to do so. The City cannot now claim that it should benefit from its failure to comply with Florida law. Further, while Rood and McLaughlin's predecessor obtained their lands based on the Zoning, it is the arbitrary and capricious of the **Comprehensive Plan** which is at issue herein.

ISSUES RAISED BELOW

It should also be noted that, as required by the Florida Rules of Appellate Procedure, Rule 9.110, Petitioners filed a notice of appeal from the dismissal with prejudice of certain counts of the Third Amended Complaint. That appeal was then abated

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[2] § 163.3194(1)(b), Florida Statutes, 1987.

until the adjudication of the Fourth Amended Complaint. Throughout the appellate process, both parties sought an adjudication of the dismissal of **both** the Third and Fourth Amended Complaint.

In the "Conclusion" of Appellants' Initial Brief to the District Court. (Supplemental Appendix [3] at SA-1), Petitioners prayed that:

> "The Orders of the lower Court should be reversed, and this matter should be remanded for an adjudication of the Fourth Amended Complaint and of Counts III, V, VII, VIII, IX, X and XI of the Third Amended Complaint." SA at SA-1 - SA-2

Count IX of the Third Amended Complaint (Appendix at A-103 - A-109, ¶¶ 239 - 264) is the Count which is at issue before this Court.

The City responded in kind, arguing before the District Court:

> "Count IX, alleging arbitrary and capricious land use designations, was properly dismissed because of a fatal repugnancy between the complaint and exhibits thereto, whereby the appellants stipulated the reasonableness

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[3] Reproduced in this Reply Brief, herinafter "SA at ___".

of the challenged designations; and also because the appellants acquired the land with actual or constructive notice of the land's Comprehensive Plan designations; and also because § 163.3231, Fla. Stat. (1987) bound them to the designations in the Comprehensive Plan." SA at SA-25.

Furthermore, both parties briefed and argued **both** those counts which were dismissed with prejudice from the Third Amended Complaint, **and** the dismissal of the Fourth Amended Complaint. See, *e.g.* the City's Answer Brief, SA at SA-3, *et.seq.* Further, the City's Brief to the District Court included approximately 50 direct [4] references to the Third Amended Complaint (of which at least seven were to Count IX,) and, *inter alia*, the following headings:

"III. The Prior, 6-20-94 Order Properly Dismissed with Prejudice from the Third Amended Complaint Counts III, V, VII, VIII, IX, X, AND XI." SA at SA-24

"III. In its 6-20-94 Order Concerning the

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[4] *I.e.* not in quoted passages.

Third Amended Complaint, the Trial Court Properly Dismissed with Prejudice Counts III, V, VII, VIII, IX, X, AND XI" SA at SA-59.

"a) The Trial Court Properly Dismissed Count IX of the Third Amended Complaint with Prejudice." SA at SA-84.

Further, the City introduced an entire section of its Answer Brief (SA at SA-60) with the "note" that the subject section referred to the Third Amended Complaint.

Therefore, both parties litigated before the highest state Court with jurisdiction, the dismissal with prejudice of Count IX of the Third Amended Complaint, which count sought damages for the imposition of an arbitrary and capricious Comprehensive Plan designation, and was the companion to an identical, approved Declaratory Judgment count.

The City cannot now be heard to allege that Petitioners waived or abandoned Count IX of the Third Amended Complaint. (If this position had any merit, it should have been raised before the District Court and not, for the first time, before this Court.)

THE FILING OF THIS PETITION

The City also suggests that this Petition for Writ of Certiorari should be denied because it was not timely filed. The contrary is true. Reproduced at SA-98 is the Express Mail Waybill showing that the Petition was timely mailed on September 4, 1996 and reproduced at SA-99 is the original envelope (which was misaddressed,) to the City Attorney. [5] (The error in addressing the City's copies of the Petition was not prejudicial as it took **eight days** (October 7 to October 15, for Petitioners to receive the Brief in Opposition, whereas the initial Petition, being local mail, presumable was delivered on September 8th or 9th, four or five days after filing, as opposed to eight days.)

ARGUMENT

THE PETITION WAS TIMELY FILED

As set out in the foregoing statement of the case, the Petition was timely filed, having been mailed in accordance with Rule 29.2, on the last day permitted by Justice Kennedy's Order.

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[5] The originals of these documents are being filed with the Court.

PROCEEDINGS BELOW

Petitioners agree with the City that the crux of their petition relates to whether or not Count IX of the Third Amended Complaint (Appendix at A-103, *et.seq.*,) should have been reinstated by the District Court. The City, in what can only be construed as an affirmative effort to mislead this Honorable Court, suggests that Petitioners acquiesced to the ruling and "waiv[ed] their appeal to the dismissal of the Third Amended Complaint." (Brief in Opposition at 5.)

However, as set forth in the Statement of the Case herein, the contrary is true. Petitioners sought the reversal of that ruling by the District Court; the City, in its Answer Brief to the District Court, discussed the Third Amended Complaint at least 50 times and directed at least two separate sections of that Brief to the Third Amended Complaint. The City cannot now be heard to suggest that Petitioners "waived their appeal" of the dismissal of the Third Amended Complaint. [6] Further, in their Motion for Recon-

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[6] The cases cited by the City in support of the proposition that Petitioners waived their appeal of the dismissal of the Third Amended Complaint are so totally inapposite as not to merit discussion herein.

sideration to the District Court (SA at SA-89, *et.seq.*,) Petitioners specifically addressed the question that is before this Court.

Therefore, the dismissal with prejudice of Count IX of the Third Amended Complaint was properly and timely raised, and is properly before this Court.

A DECISION WAS HAD FROM THE HIGHEST AVAILABLE STATE COURT

As set out above, the dismissal with prejudice of Count IX of the Third Amended Complaint was adjudicated by the highest Court of the state from which a decision can be had.

THERE IS A FEDERAL QUESTION IN THIS CASE AND THE DECISIONS BELOW REFLECT THE FEDERAL QUESTION

As set out in the Statement of Case, *supra*, the jurisdiction of the Trial Court was invoked pursuant to 42 U.S.C. § 1983, *et.seq.* and the federal question of the arbitrary and capricious land use designation was litigated throughout the proceedings below. The District Court found that Petitioners had alleged a cause of action sufficient for a Declaratory Judgment

action declaring that the Comprehensive Plan designations were arbitrary and capricious, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Therefore, under Federal Constitutional law, Petitioners are entitled to an adjudication of the corresponding damage claim: *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, (1987).

CONCLUSION

The instant Petition for Writ of Certiorari was timely filed with this Court, and promptly served on the City. There is a significant and important Federal Constitutional question herein - whether a Plaintiff is entitled to a Declaratory Judgment declaring a land use regulation to be arbitrary and capricious but not to a corresponding damage action. This question was decided adversely to Petitioners by the highest state court from which a decision can be had.

This cause is properly before this Court, and this Court should grant certiorari and reverse the decision so that Petitioners may seek both prongs of their Constitutionally guaranteed remedy.

Respectfully submitted,

/s/ E. B. Rood
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CONCLUSION TO PETITIONERS (APPELANTS') INITITAL BRIEF

CONCLUSION

This is a complex law suit. There are numerous, separate and distinct causes of action, all of which must be pled herein, both to plead the necessary ultimate facts, and to avoid a later defense of issue preclusion. While the Complaint herein is lengthy, it is necessarily so, and has been significantly shorted. Within the parameters of the law and rule, the Complaint complies with the rules of pleading.

Dismissal of certain counts was based on facts not appearing in the record, affirmative defenses, and by the Court going beyond the four corners of the Complaint. Appellants stated causes of action which should not have been dismissed. Further, Appellants strictly complied with the Rules of Civil Procedure and with the previous Orders of the Court. Further, Counts previously approved were not subject to a renewed test by Motion to Dismiss, and Appellants were entitled to add a new theory of recovery which ripened during the case. Appellants stated causes of action for rescission and duress. The Exhibits were neither inconsistent with, nor negated the Complaint,

and were not repugnant to the Complaint. The counts related to the attachment of the Comprehensive Plan to its Ordinance did not accrue until discovery in this matter, and were not barred by the statute of limitations. Appellants properly pled jurisdiction for civil rights violations, and were entitled to present their case on its merits.

Florida law prefers an adjudication on the merits, rather than dismissal of a case based on technical impediments. The Orders of the lower Court should be reversed, and this matter should be remanded for an adjudication of the Fourth Amended Complaint and of Counts III, V, VII, VIII, IX, X and XI of the Third Amended Complaint.

IN THE DISTRICT
COURT OF APPEAL OF FLORIDA
SECOND DISTRICT [*]

E.B. ROOD et al.,
Plaintiffs/Appellants,

v. Case No. 94-02479

THE CITY OF OLDSMAR et al.,
Defendants/Appellees.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES, THE CITY OF OLDSMAR, THOMAS PINTA, AND NICK STASZKO

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[*] The Table of Contents and the Table of Citations are omitted from the City's Answer Brief, as reproduced herein.

APPELLEES' RESPONSE TO THE APPELLANTS' STATEMENT OF THE CASE AND OF THE FACTS

The appellants in this case are E.B. ROOD, Esq., a trial lawyer who has been a member of the Florida Bar for decades and who is a past president of the American Trial Lawyers' Association, and R. BRUCE McLAUGHLIN, a planning and real estate consultant. The appellees are THE CITY OF OLDSMAR; THOMAS PINTA (Mayor or Councilman at all relevant times); and NICK STASZKO (Community Development Director at all relevant times), with Mr. Pinta and Mr. Staszko sued in their individual capacities. Mr. Pinta and Mr. Staszko concur with and join in the positions and arguments of the city.

The appellants have made a basic error in their Statement of the Case and of the Facts. They have repeatedly reported as facts items which are merely allegations in their Third Amended Complaint or Fourth Amended Complaint. For example, in the final paragraph of page 1 of the appellants' Statement, they state as a fact that "Rood, under duress, purchased capacity from the City . . . ." The assertion of duress is not a fact, but merely the

central allegation of Count VII of the appellants' Third Amended Complaint, which count was dismissed with prejudice in the 6-20-94 order on appeal. R 847-848, 851.

For further example, on page 4 of their Statement, the appellants state as a fact that "Defendant Thomas Pinta, in order to enhance his son's ability to obtain the Collen/McLaughlin property, led the City away from good faith negotiations, and the Amended Development Agreement could never be implemented." These assertions are not facts, and do not even appear in the Fourth or Third Amended Complaints; at best they are elaborations of allegations made in ¶¶ 32 and 149 of the Fourth Amended Complaint, R 909, 936.

Thus, the city objects to the appellants' Statement of the Case and of the Facts because it states mere allegations as facts. However, the city accepts the Statement as a summary of the allegations of the Third and Fourth Amended Complaints, with the exception noted in the paragraph above, and with the exceptions noted after the next two paragraphs.

The 10-20-94 order on appeal (R 946-947) involuntarily dismissed the action under Rule 1.420(b) on the grounds (a) that the appellants'

Fourth Amended Complaint did not comply with the trial court's 6-20-94 order (R 843-851) to streamline the five counts that survived the same order's dismissal with prejudice of the seven other counts of the Third Amended Complaint, and (b) that the appellants' Fourth Amended Complaint re-pleaded counts that were dismissed with prejudice from the Third Amended Complaint, and (c) that the appellants' Fourth Amended Complaint raised new causes of action without leave of court.

As to the 6-20-94 order (R 843-851), the appellants have appealed its dismissal with prejudice of Counts 3, 5, 7, 8, 9, 10, and 11 of the Third Amended Complaint. Although that same order commanded the appellants to streamline the remaining five counts per Rule 1.110 so as to make them "concise [and] plain," the appellants have nowhere appealed this order to streamline, neither in their Notice of Appeal, R 861, nor in their corresponding Statement of Judicial Acts to be Reviewed, R 876.

EXCEPTIONS TO THE APPELLANTS' STATEMENT OF THE CASE AND OF THE FACTS, WHICH THE CITY ACCEPTS SOLELY AS A SUMMARY OF THE ALLEGATIONS OF THE THIRD AND FOURTH AMENDED COMPLAINTS:

Exception 1. On page 1 of their Statement, the appellants claim that

> "When Rood and McLaughlin's predecessor in title (Keith Collen) acquired the properties, the properties were zoned General Commercial (C-2) on the S.R. 584 frontage and Residential Planned Development at 7.5 units per acre for the balance of the properties. Under the City of Oldsmar Comprehensive Plan, all of Rood's property was in a Residential designation and all of McLaughlin's property was in an Open Space designation." (Emphasis added.)

This is at best highly misleading, and at worst fraud on the court. This is so because the appellants neglect to inform this Court of ¶¶ 92-94 (R 923) of their Fourth Amended Complaint, which correctly allege that the city adopted its Comprehensive Plan in 1980 (¶ 92), and that the zonings reported by the appellants in their Statement are superseded zonings

under the prior 1972 Oldsmar Zoning Ordinance (¶¶ 93-94). The appellants do admit in the first paragraph of their Statement that they acquired their properties in 1982 (Rood and Collen) and 1992 (McLaughlin, as Collen's successor).

Thus, the appellants acquired their properties two or twelve years after the Oldsmar Comprehensive Plan became law in 1980, which superseded the 1972 Zoning Ordinance and zonings thereunder. Therefore, it is highly misleading or even fraudulent for them to state to this Court that "[w]hen Rood and McLaughlin's predecessor in title (Keith Collen) acquired the properties, the properties were zoned General Commercial (C-2) on the S.R. 584 frontage and Residential Planned Development at 7.5 units per acre for the balance of the properties." (Appellants' Statement of the Case and of the Facts, ¶ 2; emphasis added.)

Exception 2. On page 5 of their Statement, the appellants claim that they attacked the legality of the City's Comprehensive Plan partly on the basis that "no Plan was ever attached to the adopting Ordinance." However, reference to Count V of the Third Amended Complaint reveals ¶ 187, which alleges only that "No Land Use Element of the

Comprehensive Plan is attached to Ordinance 80-12 . . . ." (R 303; emphasis added). This is not an allegation that the plan was never attached to the adopting ordinance; nor is it an allegation that the plan was unattached to the adopting ordinance at the time of passage.

This count was dismissed with prejudice, R 851, and therefore was not repleaded in the Fourth Amended Complaint.

Exception 3. On pages 6 and 7 of their Statement, the appellants set forth a table comparing the Third and Fourth Amended Complaints. The city submits the following exceptions and additions to that table.

As to COUNTS I, II, IV, and XII of the Third Amended Complaint: it is misleading to state that the disposition of these counts was merely that these counts were "Approved" by the trial court. It is likewise misleading to state that, as to COUNT VI, the disposition was merely "Dismissed without Prejudice." Instead, the trial court ordered streamlining of all these counts, thus:

"On the whole, the Court finds the Plaintiffs' complaint inordinately long, complicated and replete with legal conclusions, assumptions and speculative statements of fact. Moreover, the

complaint is replete with contradictions, repugnancies and redundancies while containing textbook phrases of zoning with broad allusions to law that are on the whole deficient.

" . . . justice demands that the Plaintiffs, in their Fourth Amended Complaint, replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." Order of Court, dated 6-17-94, filed 6-20-94, pp. 8-9, R 850-851 (emphasis added).

The Court reiterates these words 12 lines later:

"Moreover, the Plaintiffs' Fourth Amended Complaint shall replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." 6-20-94 Order of Court, R 851.

As to COUNT VIII of the Third Amended Complaint, the correct title thereof is "Refusal to Terminate Development Agreement and Refund Fees." The appellants correctly report in their table that this count was dismissed with prejudice. However, they do not report that two counts titled exactly the same were pleaded in the Fourth

Amended Complaint as Counts IV and VI thereof, seeking, respectively, an injunction and damages, and claiming in these versions that termination of the original, 1988 development agreement had been accomplished by the passage of time. The city's position with regard to these counts was that either they were barred as being amended versions of the same-titled COUNT VIII of the Third Amended Complaint, which had been dismissed with prejudice, and which thus could not be presented anew, even in an amended version; or that they were new causes of action, presenting new issues and varied grounds for relief, and therefore barred under the doctrine of "departure in pleading." Cox v. Seaboard Coast Line Railroad Co., 360 So.2d 8 (Fla. 2d DCA 1978), cert. denied, 367 So.2d 1123 (Fla. 1979):

> "[I]t is equally well established that [Rule 1.190(c)] does not authorize a plaintiff, under the guise of an amendment, to state a new and different cause of action. Consequently, an amendment will not be allowed if the amendment will change an issue, introduce new issues, or materially vary the grounds of relief." Id. at 9; likewise, Dunn v. Campbell, 166 So.2d 217 (Fla. 2d DCA 1964); and Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA

1984), rev. denied, 484 So.2d 7 (Fla. 1986). See Argument 11-B, below.

As to COUNT XI of the Third Amended Complaint, the appellants state in their table thus: "Individual Defendants in Default." The individual defendants--THOMAS PINTA (Mayor or Councilman at all relevant times) and NICK STASZKO (Community Development Director at all relevant times)--are appellees in this appeal, and deny that they were ever in default, and point out that there was never any clerk's entry of default or any court order adjudicating default.

The appellees also disagree with the appellants' statement that this count was "Dismissed with Prejudice as to City Defendant Only." The order, R 851, is not so limited; and the dismissal with prejudice was not voluntary on plaintiffs' part, and accordingly extended to all parties sued. Osborne v. Shell Oil Co., 104 So.2d 670 (Fla. 1st DCA 1958):

> "When an involuntary dismissal occurs, the suit is dismissed and it carries all the parties and the entire action out of court." Id. at 671, and authorities cited therein.

Thus it was improper for the appellants to duplicate this prejudicially dismissed COUNT XI almost

entirely verbatim as Count VIII in the Fourth Amended Complaint, with the only difference being the elimination of the city as a defendant.{[1]}

In addition, even assuming arguendo that the count survived as to the individual defendants, it was still properly dismissed under Rule 1.420(b), because, other than deleting the city from the count, the appellants reproduced it verbatim, contrary to the court's 6-20-94 order to streamline all surviving counts so as to render them concise and plain in accordance with Rule 1.110. 6-20-94 Order, R 851.

Exception 4. On page 8 of their Statement of the Case and of the Facts, the appellants state that the defendants missed the 8-3-94 due date for their Answer to the Fourth Amended Complaint and that "[a]lthough in default, the City filed a Motion to

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[1] The appellees refer to "Count VIII" of the Fourth Amended Complaint in an attempt to avoid confusion that will otherwise result from an error of the appellants. Appellants' first Count VI appears on p. 30 of the Fourth Amended Complaint, R 932. Their next count--"Slander of Title"--is also identified as Count VI (R 933). Compounding this error, their subsequent count--"Delay"--is misnumbered as "Count VII" (R 935). The appellees will refer to these misnumbered counts by the numbers that they should have borne, namely Count VII (Slander of Title) and Count VIII (Delay).

Dismiss with Prejudice, and an untimely Motion for Enlargement of Time in which to respond to the final complaint." The city denies that it was ever in default, and points out that there was never any clerk's entry of default or any court order adjudicating default. The city also points out that its motion was a "Rule 1.420(b) Motion for Involuntary Dismissal," R 940-942, and denies that its 8-8-94 Motion for Extension of Time was untimely, given that Fla.R.Civ.P. 1.090(b)(2) authorizes such post-deadline motions.

Exception 5. On page 9 of their Statement, at footnote 7, the appellants state that "[a] small portion of the reduction [in length of the Fourth Amended Complaint] did come from the dismissal with prejudice of certain counts in the Third Amended Complaint." The city disagrees; in fact, because the 6-20-94 Order dismissed with prejudice seven of the twelve counts of the Third Amended Complaint, the reduction in length of the Fourth Amended Complaint as compared to the Third stems overwhelmingly from the removal of the counts dismissed with prejudice, and from the removal of the multitudinous paragraphs in the "INTRODUCTION" that related to the counts

dismissed with prejudice. The failure of the appellants to streamline the surviving counts is amply demonstrated in the city's "Table Comparing the Wording of the Fourth Amended Complaint with That of the Third Amended Complaint," which is set forth in the "Argument" section of this brief, at part II-3, below. That table demonstrates that the counts alleged in the Fourth Amended Complaint are duplicated almost entirely verbatim from the corresponding counts in the Third Amended Complaint, and that in those instances where paragraphs of counts in the Fourth Amended Complaint are not verbatim reproductions of their predecessors, they are mostly longer than their predecessors. Such failure to streamline violated the trial court's 6-20-94 order, R 850-851, and led to the 10-20-94 order dismissing the cause under Rule 1.420(b) for noncompliance with the 6-20-94 order. R 946-947.

Exception 6. On page 9 of their Statement, the appellants assert that their claim of expiration of the 1988 Development Agreement--embodied in Counts IV and VI of the Fourth Amended Complaint--"had not ripened until the filing" of that complaint, because of the "necessary exhaustion of

administrative remedies." The city disagrees. Reference to page 23 of their Initial Brief reveals that the appellants define as an "administrative remedy" their quest "to determine if the City would consider the agreement terminated, and restore them to their pre-Agreement status." Such inquiry or negotiation is simply not an administrative remedy. Accordingly, Counts IV and VI of the Fourth Amended Complaint are barred by res judicata, because those counts' claim of expiration of the agreement on 2-4-93 could have been raised, but were not raised, in either the Second Amended Complaint (filed 3-16-93, R 128-256) or in the Third Amended Complaint (filed 8-27-93, R 265-442). "[U]nder res judicata all issues that were or could have been raised in the action are concluded by the judgment whether raised or not." Trawick's Florida Practice and Procedure (1994 ed.), § 25-13, p. 410, citing and paraphrasing Gordon v. Gordon, 59 So.2d 40 (Fla. 1952):

"[R]es adjudicata . . . is founded upon the sound proposition that there should be an end to litigation and that in the interest of the State every justiciable controversy should be settled in one action in order that the courts and the parties will not be pothered

for the same cause by interminable litigation . . . under res adjudicata a final decree or judgment bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised." Gordon at 44 (emphasis added).

Accordingly, plaintiffs' claim in Counts IV and VI of the Fourth Amended Complaint, that the Development Agreement allegedly expired on February 4, 1993--over 6 months before the filing of the Third Amended Complaint, and over 5 weeks before the filing of the Second Amended Complaint--cannot avoid rejection under res judicata, because it is a matter germane to the identically titled cause of action set forth in the dismissed Count VIII, and such claim could have been raised in that Count in the Third Amended Complaint, or even in the corresponding count in the Second Amended Complaint.

Exception 7. Concerning the "new counts" discussed in "Exception 6," above, the appellants state thus:

"While it may have been prudent for Plaintiffs to seek the prior leave of the Court to add these counts, the Court could certainly have required and

granted a motion for leave to amend." Appellants' Statement of the Case and of the Facts, p. 9.

This is frivolous. The appellants admit that they filed no such motion for leave, but now claim that it was up to the trial court to tell them to file such a motion, and on top of that to grant it. This is simply not the responsibility of the court.

Exception 8. On page 9 of their Statement, the appellants accuse the City of "[l]eading the lower Court to misunderstandings of the law and the facts, and . . . creating an impossible standard for Plaintiffs to meet the City's demand for shorter pleadings at the same time the City demanded more detail in the Complaint . . . ." The City denies that it led the lower court to "misunderstandings of the law and the facts."

The City also denies that it created an "impossible" double standard of lengthening and shortening. Reference to page 17 of the appellants' brief reveals that what they are talking about is two instances wherein the city appropriately complained about omissions: once where the appellants, having alleged jurisdictional statements in their general introduction to the Fourth Amended Complaint, did not re-allege them by reference in Counts I through IV thereof;

and once where the city appropriately complained about vagueness in Count XI ("Delay") of the Third Amended Complaint.

That objection to vagueness as to one of the twelve counts in the Third Amended Complaint is not, as the plaintiffs would have it, a wholesale insistence that the entire complaint be lengthened. It is rather an insistence that this count be a plain statement of ultimate facts at the same time that it be concise. If this is contradictory, then so is Rule 1.110(b), which commands precisely that every Florida complaint contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." The trial court insisted on no more and no less than what the rule requires, R 850-851 ("the Plaintiffs' Fourth Amended Complaint shall replead the valid causes of action in compliance with Rule 1.110, Fla. R. Civ. P., which requires a concise, plain statement of facts"), and the failure to fulfill this requirement, universal to all Florida complaints, contributed to the Rule 1.420(b) dismissal for noncompliance with the order of the court. 10-20-94 Order, R 946-947.{[2]}

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[2] Nor is the federal-style "notice pleading" acceptable in Florida courts. Continental Baking Co. v. Vincent, 634 So.2d 242 (Fla. 5th DCA 1994):

"We note, however, that the above-discussed pair of orders suggests the lower court's rulings on petitioner's motions may have been affected by the previous rulings of the federal district court. This is cause for concern. The pleading standard in federal court and the pleading standard in our state courts differ radically. The federal courts only require notice pleading; Florida is a fact-pleading jurisdiction. *See generally* Sherman Cohn, *Notice Pleading: End of a 55-Year Experiment*, Am. Inns of Court Fed.Prac.Dig. 17 (11th Cir. ed., Apr. 1993). The quality of pleading that is acceptable in federal court and which will routinely survive a motion to dismiss for failure to state a claim upon which relief may be granted will commonly not approach the minimum pleading threshold required in our state courts. Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort. The fact that a pleading of a state law claim in a diversity case in federal court has survived a motion to dismiss says nothing about whether the claim meets the pleading standard required in our state courts." Id. at 244 (emphasis added).

The appellants' citation of the Rios case is to no avail. Although that case does speak of Florida pleading as "notice pleading," it is plain from the context quoted by the appellants themselves that the notice required by Florida must be given by pleading ultimate facts sufficient to state a cause of action. Rios v. McDermott, Will & Emery, 613 So.2d 544, 545 (Fla. 3d DCA 1993); quoted in the appellants' Initial Brief, p. 19.

SUMMARY OF ARGUMENT

I. Without a Transcript of the Hearing Which Generated the Rule 1.420(b) Order Challenged in this Appeal, the Order Must be Affirmed. This Court has never been furnished with a transcript of the hearing which generated the 10-20-94 order being challenged in this appeal. The order resolved factual issues, and was not fundamentally erroneous on its face. Therefore, it must be affirmed. Southeast Bank, N.A. v. David A. Steves, P.A., 552 So.2d 292 (Fla. 2d DCA 1989).

II. Alternatively, the 10-20-94 Order Should be Affirmed Because the Trial Court Did Not Abuse Its Discretion in Dismissing the Action Under Rule 1.420(b), Given that the Appellants Failed to Comply with the Prior Order of the Court. The standard of review for an order dismissing an action under Rule 1.420(b) is whether the trial court abused its discretion. Dewitt v. Rossi, 559 So.2d 659 (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990); Lutheran Senior Citizens' Foundation, Inc. v. B.F. Schumacher, 355 So.2d 861, 863 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 833 (Fla. 1978). The appellants have made no argument whatsoever in their Initial Brief that the trial court abused its

discretion by granting the city's Rule 1.420(b) Motion for Involuntary Dismissal. Therefore the appellants have waived any such argument, and the order granting that motion should be affirmed. Nor can they now raise an "abuse of discretion" argument in their forthcoming Reply Brief. J.A.B. Enterprises v. Gibbons, 596 So.2d 1247, 1250 (Fla. 4th DCA 1992).

Without waiving the appellants' waiver of the abuse of discretion argument, the appellees submit that the court properly exercised its discretion in granting the Rule 1.420(b) motion. In the oft-cited case of Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), the Supreme Court defined the abuse of discretion standard thus:

> " 'discretion is abused only where no reasonable man would take the view adopted by the trial court.' " Id. at 1203 (citation omitted; emphasis added).

Rule 1.420(b) authorizes involuntary dismissal of an action "for failure of an adverse party to comply with . . . any order of court." The Court's prior, 6-20-94 order commanded that appellants' forthcoming Fourth Amended Complaint "replead the valid causes of action in compliance with Rule 1.110, Florida

Rules of Civil Procedure, which requires a concise, plain statement of facts." R 851 (emphasis added). However, the appellants disobeyed this order, and mostly reproduced verbatim the corresponding counts of the Third Amended Complaint in their Fourth Amended Complaint, and also added new allegations, all as shown at the comparative table set forth in Argument II-3, below.

By substantially duplicating the counts instead of rewriting them so as to make them "concise" and "plain," as the court ordered, the appellants failed to comply with the court's order, and violated Rule 1.110(b) as well. Thus, under Rule 1.420(b), as well as under case law, the trial court properly dismissed the action with prejudice. Dewitt v. Rossi, 559 So.2d 659 (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990); Lutheran Senior Citizens' Foundation, Inc. v. B.F. Schumacher, 355 So.2d 861, 862-863 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 833 (Fla. 1978). Because it cannot be said that "no reasonable man would take the view adopted by the trial court," the trial court did not abuse its discretion, Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). Therefore, the 10-20-94 order of dismissal should be affirmed.

If the Court affirms on the basis of the arguments set forth in either Parts I or II, above, then it will not be necessary for the Court to consider the remaining arguments in this brief, since such an affirmance will moot the remainder.

III. The Prior, 6-20-94 Order Properly Dismissed with Prejudice from the Third Amended Complaint Counts III, V, VII, VIII, IX, X, AND XI. The trial court properly dismissed with prejudice Counts III, VII, VIII, IX, and XI, because they had all previously been dismissed twice, and withdrawn once, as set forth in detail in footnote 14, on pages 34-35, below.

In addition, Count III (and its companion, Count VIII) was properly dismissed because of fatal repugnancies between the complaint and exhibits thereto, whereby the trigger alleged for contract termination was shown not to exist in the contract. Count V (and its companion, Count X) was properly dismissed because, after thirteen years of public acquiescence in the substance of the ordinance adopting the city's Comprehensive Plan, which all the while guided the city's development, public policy forbade the appellants' attack on the validity of the ordinance because of alleged procedural

irregularities; and because it introduced new issues or materially varied the grounds of relief; and because of the Statute of Limitations.

Count VII, seeking rescission via duress, was properly dismissed because nothing alleged in it rose to the level of duress. Count IX, alleging arbitrary and capricious land use designations, was properly dismissed because of a fatal repugnancy between the complaint and exhibits thereto, whereby the appellants stipulated the reasonableness of the challenged designations; and also because the appellants acquired the land with actual or constructive notice of the land's Comprehensive Plan designations; and also because § 163.3231, Fla. Stat. (1987) bound them to the designations in the Comprehensive Plan.

Count XI, alleging a taking under 42 U.S.C. § 1983, was properly dismissed because of a fatal repugnancy within the count, i.e., although the appellants claimed that the city refused to approve any reasonable development proposal and so took all economically beneficial use of Plaintiffs' property, they contradicted themselves by conceding that a marketable site plan was approved in the 1988 contract. Nor did they state any facts supporting

jurisdiction of the court over this count.

ARGUMENT

I. BECAUSE THIS COURT WAS NOT FURNISHED WITH A TRANSCRIPT OF THE HEARING WHICH GENERATED THE RULE 1.420(b) ORDER BEING CHALLENGED IN THIS APPEAL, APPELLANTS HAVE FAILED TO DEMONSTRATE A BASIS FOR REVERSAL IN THE RECORD, AND THEREFORE THE RULE 1.420(b) ORDER INVOLUNTARILY DISMISSING THE ACTION MUST BE AFFIRMED

2. Where There Is No Transcript or Proper Substitute Therefor, a Judgment which Is Not Fundamentally Erroneous on Its Face Must be Affirmed. After the appellants filed their Fourth Amended Complaint, R 903-939, the city filed a "Rule 1.420(b) Motion for Involuntary Dismissal" of the appellants' action. R 940-942. The issues at the hearing on the motion were those set forth in the motion, and were factual issues. Specifically, those issues were:

- whether the appellants had disobeyed the prior, 6-20-94 court order by failing to "replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts," as required by the trial court in that order, R 851, 940-942; and
- whether the appellants had also disobeyed the same order by improperly repleading in the Fourth Amended Complaint two counts that the prior order had dismissed with prejudice from the Third Amended Complaint, R 851, 940-942.

After the hearing, the trial court granted the motion in an order rendered on 10-20-94. R 946-947.{[3]}

This Court has never been furnished with a transcript of the hearing which generated the 10-20-94 order being challenged in this appeal. The order

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[3] This 10-20-94 order is one of the two orders appealed by the plaintiffs in the instant appeal. The other is the prior, 6-20-94 order dismissing with prejudice seven counts of the Third Amended Complaint. R 843-851; R 861 (Notice of Appeal); R 876 (Statement of Judicial Acts to be Reviewed); R 948 (Amended Notice of Appeal). If the Court affirms the 10-20-94 order dismissing the action, the appeal of the 6-20-94 order will be mooted thereby.

resolved factual issues, and was not fundamentally erroneous on its face. Therefore, it must be affirmed. Southeast Bank, N.A. v. David A. Steves, P.A., 552 So.2d 292 (Fla. 2d DCA 1989):

"Because this court was not furnished with a transcript of the hearing which generated the order being challenged in this appeal, appellants have failed to demonstrate a basis for reversal in the record, and we must affirm therefor. As this court recently stated in *In re Guardianship of Georgina H. Read*, 555 So.2d 869, 871 (Fla. 2d DCA 1989): 'In appellate proceedings, the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank*, 377 So.2d 1150 (Fla.1979) . . . Where there is no record of the testimony of witnesses or of evidentiary rulings and where a statement of the record has not been prepared, a judgment which is not fundamentally erroneous on its face must be affirmed.' " Southeast Bank at 293.

The Supreme Court provided additional reasons why the lack of a transcript requires affirmance, in Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979):

"Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it . . .

"The trial court's [order] could well be supported by evidence adduced at trial but not stated in the judge's order or otherwise apparent in the incomplete record on appeal. The question raised by Barnett Bank clearly involves underlying issues of fact. When there are issues of fact the appellant necessarily asks the reviewing court to draw conclusions about the evidence. Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error." Id. at 1152 (citations omitted; emphasis added).

Nor can the appellants now supplement the record

by ordering a transcript from the court reporter:

> "While Florida Rule of Appellate Procedure 9.200(f)(2) does provide that '[i]f the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record,' that rule is inapplicable under the circumstances of this case where there is a complete lack of a transcript of the record below or of a statement of the proceedings pursuant to Florida Rule of Appellate Procedure 9.200(b)(3)." Southeast Bank at 293 (emphasis added).{[4]}

For these reasons, the 10-20-94 order dismissing the action under Rule 1.420(b) should be affirmed.

If the Court affirms on the foregoing basis, then it will not be necessary for the Court to consider the remaining arguments in this brief.

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[4] This Court reiterated its Southeast Bank analysis and holdings in Pertz v. Zohar, 556 So.2d 459 (Fla. 2d DCA 1990). Likewise, Clayton v. Clayton, 442 So.2d 310, 311 (Fla. 1st DCA 1983) ("we find that the lack of a trial transcript or a proper substitute is a fatal flaw in appellant's case").

II. ALTERNATIVELY, THE 10-20-94 ORDER SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION UNDER RULE 1.420(b), GIVEN THAT THE APPELLANTS FAILED TO COMPLY WITH THE PRIOR ORDER OF THE COURT

3. The Standard of Review Is Abuse of Discretion; Appellants' Waiver of This Argument; Definition Thereof. The standard of review for an order dismissing an action under Rule 1.420(b) is whether the trial court abused its discretion. Dewitt v. Rossi, 559 So.2d 659, last paragraph (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990); Lutheran Senior Citizens' Foundation, Inc. v. Schumacher, 355 So.2d 861, 863 (Fla. 3d DCA), cert. denied, 361 So.2d 833 (Fla. 1978). The appellants have made no argument whatsoever in their Initial Brief that the trial court abused its discretion by granting the city's Rule 1.420(b) Motion for Involuntary Dismissal. Therefore the appellants have waived any such argument, and the order granting that motion should be affirmed. Nor can they now raise an "abuse of

discretion" argument in their forthcoming Reply Brief. J.A.B. Enterprises v. Gibbons, 596 So.2d 1247 (Fla. 4th DCA 1992):

"Further, appellants' initial brief does not raise the issue of their failure to receive a copy of the compensation order. Appellants' reply brief denies that they received the order, however, an issue not raised in an initial brief is deemed **abandoned** and may not be raised for the first time in a reply brief. Thus, appellants cannot argue to this court that they did not receive the compensation order. Therefore, once deemed received, appellants' failure to appeal also requires us to hold that the compensation order had become final before the summary judgment hearing took place. AFFIRMED." Id. at 1250 (emphasis added; citation omitted.) To the same effect are Wingate v. United Services Automobile Association, 480 So.2d 665, 666 (Fla. 5th DCA 1985); Lynch v. Tennyson, 443 So.2d 1017, 1019 (Fla. 5th DCA 1983), overruled on other grounds, Pierce v. Progressive American Insurance, 582 So.2d 712, 715 (Fla. 5th DCA 1991); F.M.W. Properties, Inc. v. Peoples First Financial Savings and Loan Association, 606 So.2d 372, 377 (Fla. 1st DCA 1992), and additional authorities cited therein;

and McDonald v. Pickens, 544 So.2d 261 (Fla. 1st DCA 1989):

"[S]ince that argument has not been included in appellant's brief it **is not cognizable on appeal."**[5] Id. at 264 (emphasis added).

Without waiving the appellants' waiver of the abuse of discretion argument, the appellees submit the following analysis showing that the court properly exercised its discretion in granting the Rule 1.420(b) motion.

In the oft-cited case of Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), the Supreme Court defined the abuse of discretion standard thus:

"We cite with favor the following statement of the test for review of a judge's discretionary power:

'Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If

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[5] *Appellees' Note:* "Cognizable" means "[c]apable of being tried or examined before a designated tribunal; within jurisdiction of court or power given to court to adjudicate controversy." Black's Law Dictionary, 6th ed. (1990), p. 259, col. 2.

reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.' *Delno v. Market Street Railway Company*, 124 F.2d 965, 967 (9th Cir. 1942).

"In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness." Canakaris, 382 So.2d at 1203 (emphasis added).

4. There Was No Abuse of Discretion, Because the Appellants Failed to Comply with the Prior Order of the Court. Rule 1.420(b) authorizes involuntary dismissal of an action "for failure of an adverse party to comply with . . . any order of court." The Court's prior, 6-20-94 order (R 843-851, dismissing seven of twelve counts of the Third Amended Complaint) commanded that appellants' forthcoming

Fourth Amended Complaint "replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." R 851 (emphasis added). However, the appellants disobeyed this order.

First, the Fourth Amended Complaint mostly reproduces word-for-word the corresponding portions of the Third Amended Complaint. Second, where the reproductions are not verbatim, generally they are longer than in the Third Amended Complaint. Third, the Fourth Amended Complaint adds allegations of new grounds, absent from all four previous versions of the complaint, in its Counts IV and VI.{[6]} Such verbatim reproduction and lengthening of the allegations are in direct contravention of the Court's order. That order found and commanded as follows:

> "On the whole, the Court finds the Plaintiffs' complaint inordinately long, complicated and replete with legal conclusions, assumptions and

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[6] The Fourth Amended Complaint has fewer pages overall than the Third Amended Complaint only because the plaintiffs eliminated five of the seven counts that were dismissed with prejudice from the Third, along with a number of paragraphs in the Introduction relating to the counts dismissed with prejudice.

speculative statements of fact. Moreover, the complaint is replete with contradictions, repugnancies and redundancies while containing textbook phrases of zoning with broad allusions to law that are on the whole deficient.

" . . . justice demands that the Plaintiffs, in their Fourth Amended Complaint, replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." Order of Court, dated 6-17-94, filed 6-20-94, pp. 8-9, R 850-851 (emphasis added).

The Court reiterates these words 12 lines later:

"Moreover, the Plaintiffs' Fourth Amended Complaint shall replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." 6-20-94 Order of Court, R 851.

Nevertheless, the appellants disobeyed both statements of the Court's order commanding repleading in compliance with Rule 1.110, "which requires a concise, plain statement of facts." Order of Court, R 851. The table set forth below shows how the allegations of the Fourth Amended

Complaint reproduce verbatim, or substantially verbatim, the corresponding allegations of the Third Amended Complaint. Because the appellants have substantially mimicked the very wording of the Third Amended Complaint that the Court ordered substantially changed, the Fourth Amended Complaint is neither concise nor plain.

TABLE COMPARING THE WORDING OF THE FOURTH AMENDED COMPLAINT WITH THAT OF THE THIRD AMENDED COMPLAINT

¶¶ in 4th Amended Percentage Verbatim, or Other	**Source ¶¶ in 3d Amended Complaint**	**Verbatim, or**
INTRODUCTION		
¶ 1	¶ 1	Verbatim
¶ 2	¶ 2	Verbatim
¶ 3	¶ 3	Verbatim, with original 2d sentence deleted
¶ 4	¶ 4	Verbatim

¶ 5	¶ 5	Verbatim
¶ 6	¶ 6	Verbatim
¶ 7	¶ 7	Verbatim
¶ 8	¶ 8	Verbatim
¶ 9	¶ 9	Verbatim
¶ 10	¶ 10	Verbatim
¶ 11	¶ 11	Verbatim {[7]}
¶ 12	¶ 12	Verbatim
¶ 13	¶ 13	Verbatim
¶ 14	¶ 14	Verbatim
¶ 15	¶ 15	Verbatim
¶ 16	¶ 16	Verbatim
¶ 17	¶ 17	Verbatim
¶ 18	¶ 18	Verbatim
¶ 19	¶ 19	Verbatim
¶ 20	¶ 21	Verbatim
¶ 21	¶ 22	Verbatim
¶ 22	¶ 23	Verbatim
¶ 23	¶ 24	Verbatim
¶ 24	¶ 25	Verbatim

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[7] In this and in some of the other paragraphs of the Fourth Amended Complaint, the original phrase "attached hereto" has been replaced by the phrase "attached to the Third Amended Complaint." Because this is a purely procedural change, paragraphs in which this is the change are reported as "Verbatim."

¶ 25	¶ 26	Verbatim
¶ 26	¶ 27	Verbatim
¶ 27	¶ 28	Verbatim
¶ 28	¶ 29	Verbatim
¶ 29	¶ 30	Verbatim
¶ 30	¶ 31	Verbatim
¶ 31	¶ 32	Verbatim
¶ 32	¶ 33	Verbatim
¶ 33	¶ 34	Verbatim
¶ 34	¶ 35	Verbatim
¶ 35	¶ 36	Verbatim
¶ 36	¶ 37	Verbatim
¶ 37	¶ 38	Verbatim
¶ 38	¶ 59	Verbatim
¶ 39	¶ 63	78% Verbatim; new version is 24% longer than the old {[8]}

[8] This means that 78% of the words in this paragraph in the Fourth Amended Complaint appeared in the corresponding paragraph in the Third Amended Complaint. The comparative length of the corresponding paragraphs is determined by word count.

¶ 40	¶ 64	Verbatim
¶ 41	¶ 65	Verbatim
¶ 42	--	New
¶ 43	¶ 94	75% verbatim; new version is 33% longer than the old
¶ 44	¶ 96	Verbatim
¶ 45	¶ 97	Verbatim
¶ 46	¶ 98	Verbatim
¶ 47	¶ 99	Verbatim
¶ 48	¶ 100	82% Verbatim; new version is 10% longer than the old
¶ 49	¶ 101	Verbatim
¶ 50	¶ 102	Verbatim
¶ 51	¶ 103	Verbatim
¶ 52	¶ 104	75% Verbatim; new version is 19% shorter than

		the old (new claim: expiration)
¶ 53	¶ 105	50% Verbatim; new version is one word longer than the old (new claim: expiration)
¶ 54	¶ 106	Verbatim, except for deletion of first word, "Further"
¶ 55	¶ 107	31% Verbatim; new version is twice as long as the old (new claim: expiration)
¶ 56	¶ 108	Verbatim

¶ 57	¶ 109	Verbatim
¶ 58	¶ 110	88% Verbatim; new version is 14% longer than the old (new claim: expiration)
¶ 59	¶ 111	Realleges prior paragraphs
¶ 60	¶ 112	Verbatim
¶ 61	¶ 113	Verbatim
¶ 62	¶ 114	Verbatim
¶ 63	¶ 115	Verbatim
¶ 64	¶ 116	Verbatim
¶ 65	¶ 117	Verbatim
¶ 66	¶ 118	Verbatim
¶ 67	¶ 120, 131, 164	61% Verbatim; new version is 38% longer than the old
¶ 68	¶ 121, 132, 165	53% Verbatim;

		new version is 42% longer than the old
COUNT I		
¶ 69	¶ 119	Realleges prior paragraphs
¶ 70	¶ 49	Verbatim
¶ 71	¶ 50	81% Verbatim; new version is 23% longer than the old
¶ 72	¶ 51	Verbatim
¶ 73	¶ 123	Verbatim
¶ 74	¶ 55	Verbatim
¶ 75	¶ 56	Verbatim
¶ 76	¶ 57	Verbatim
¶ 77	¶ 58	Verbatim
¶ 78	¶ 125	Verbatim
¶ 79	¶ 126	Verbatim, with a 12-word clause deleted
¶ 80	¶ 127	Verbatim

¶ 81	¶ 128	Verbatim
¶ 82	¶ 129	Verbatim
COUNT II		
¶ 83	¶ 130	Realleges prior paragraphs
¶ 84	¶ 133	Verbatim
¶ 85	¶ 134	72% Verbatim; new version is 38% longer than the old (new claim: expiration)
¶ 86	¶ 135	Verbatim
¶ 87	¶ 136	Verbatim
¶ 88	¶ 137	Verbatim
¶ 89	¶ 138	Verbatim
¶ 90	¶ 139	Verbatim
COUNT III		
¶ 91	¶ 163	Realleges prior paragraphs
¶ 92	¶ 166	65% Verbatim;

		new version is 55% longer than the old
¶ 93	¶ 167	87% Verbatim; new version is 15% longer than the old
¶ 94	¶ 168	Verbatim, with the addition of one word
¶ 95	¶ 169	Verbatim
¶ 96	¶ 170	81% Verbatim; new version is 23% longer than the old
¶ 97	¶ 171	Verbatim
¶ 98	¶ 45	95% Verbatim; new version has three new words
¶ 99	¶ 172	Verbatim

¶ 100	¶ 47	Verbatim
¶ 101	¶ 173	Verbatim
¶ 102	¶ 174	Verbatim
¶ 103	¶ 175	Verbatim
¶ 104	¶ 176	Verbatim
¶ 105	¶ 177	Verbatim
¶ 106	¶ 178	Verbatim
¶ 107	¶ 179	Verbatim
¶ 108	¶ 180	Verbatim
¶ 109	¶ 181	Verbatim
¶ 110	¶ 182	Verbatim
COUNT IV		
¶ 111	¶ 214	Realleges prior paragraphs
¶ 112	¶ --	(New claim: expiration)
¶ 113	¶ --	(New claim: expiration)
¶ 114	¶ --	(New claim: expiration)
COUNT V		
¶ 115	¶ 192	Realleges prior paragraphs

¶ 116	¶ 193	54% Verbatim; new version is 60% longer than the old
¶ 117	¶ 51	Rewritten; new version is 33% shorter than the old
¶ 118	¶ 55	Rewritten; new version is 24% shorter than the old
¶ 119	¶ 52	Rewritten; new version is 79% shorter than the old
¶ 120	¶ 194	Verbatim
¶ 121	¶ 195	Verbatim
¶ 122	¶ 196	Verbatim
¶ 123	¶ 197	Verbatim
¶ 124	¶ 198	Verbatim,

		with last sentence omitted
¶ 125	¶ 200	Rewritten; new version is 46% shorter than the old
¶ 126	¶ 199	Verbatim
¶ 127	¶ 200	Verbatim
¶ 128	¶ 201	Verbatim
¶ 129	¶ 202	Verbatim
COUNT VI		
¶ 130	¶ 214	Realleges prior paragraphs
¶ 131	¶ --	(New claim: expiration)
¶ 132	¶ --	(New claim: expiration)
¶ 133	¶ --	(New claim: expiration)
COUNT VII		
¶ 134	¶ 292	Realleges prior

		paragraphs
¶ 135	¶ 293	Verbatim
¶ 136	¶ 294	Verbatim
¶ 137	¶ 295	Verbatim
¶ 138	¶ 296	Verbatim
¶ 139	¶ 297	Verbatim
¶ 140	¶ 298	Verbatim
COUNT VIII		
¶ 141	¶ 277	Realleges prior paragraphs
¶ 142	¶ 278	Verbatim
¶ 143	¶ 279	Verbatim
¶ 144	¶ 280	Verbatim {[9]}
¶ 145	¶ 281	Verbatim
¶ 146	¶ 282	Verbatim
¶ 147	¶ 283	Verbatim
¶ 148	¶ 284	Verbatim
¶ 149	¶ 285	Verbatim
¶ 150	¶ 286	Verbatim
¶ 151	¶ 287	Verbatim
¶ 152	¶ 288	Verbatim
¶ 153	¶ 289	Verbatim

[9] The new version is identical to the old, except that it deletes Oldsmar as a defendant.

¶ 154	¶ 290	Verbatim
¶ 155	¶ 291	Verbatim

Because the Fourth Amended Complaint substantially mimics and reproduces the overlong and over-elaborate wording of the Third Amended Complaint, then just like the Third Amended Complaint it is inevitably "inordinately long, complicated, and replete with conclusions, assumptions, and speculative statements of fact." 6-20-94 Order, R 850. As such, the Fourth Amended Complaint fails to comply with the Court's order commanding adherence to Rule 1.110 via streamlining of the complaint. Such noncompliance justified involuntary dismissal of the entire action. Dewitt v. Rossi, 559 So.2d 659 (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990); Lutheran Senior Citizens' Foundation, Inc. v. B.F. Schumacher, 355 So.2d 861 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 833 (Fla. 1978).

In Lutheran, the appellate court upheld the trial court's dismissal with prejudice of the second amended complaint therein. The same reasons that justified the dismissal in that case justified dismissal in this case:

"The second amended complaint contained counts

and allegations that were both moot and prolix, in contravention of Fla.R.Civ.P. 1.110(b)(2). In addition, appellant not only failed to eliminate those lengthy and superfluous matters from the second amended complaint, as required by the prior order of the court dated April 4, 1975, but in fact added additional allegations.

"Florida courts have long held that a plaintiff may be required to amend or recast a complaint, disposing of burdensome allegations. In that appellant was ordered to streamline his pleading and failed to do so, the trial court, upon its discretion, had the authority to dismiss the second amended complaint. See Fla.R.Civ.P. 1.420(b) . . . the order of dismissal is hereby affirmed." Lutheran, 355 So.2d at 863 (emphasis of "added" is in original; remaining emphasis is added; citations omitted).

Just as in Lutheran, the appellants at bar "not only failed to eliminate those lengthy and superfluous matters from the second amended complaint, as required by the prior order of the court . . . but in fact added additional allegations {[10]}. . . [the

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[10] The appellants claim that "Counts IV [seeking an injunction] and VI [seeking damages], respectively, [of the

Fourth Amended Complaint], although captioned the same" as Count VIII of the Third Amended Complaint (*"Refusal to Terminate Development Agreement and Refund Fees"*), are "new counts" because they "seek a Declaratory Judgment that the original Development Agreement is now terminated by the operation of time . . . . " Initial Brief, pp. 22-23. Assuming *arguendo* that plaintiffs are indeed raising a new cause of action in Counts IV and VI, then they constitute "additional allegations" of the sort decried in Lutheran as contrary to the trial court's order to streamline the complaint. In addition, they would be barred by the doctrine of "departure in pleading," in that these counts change an issue, introduce new issues, or materially vary the grounds of relief. Cox v. Seaboard Coast Line Railroad Co., 360 So.2d 8 (Fla. 2d DCA 1978), cert. denied, 367 So.2d 1123 (Fla. 1979); Dunn v. Campbell, 166 So.2d 217 (Fla. 2d DCA 1964); and Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA 1984), rev. denied, 484 So.2d 7 (Fla. 1986). See Argument 11-B, below.

New allegations of expiration were also added to ¶¶ 52, 53, 55, 58, and 85 of the Fourth Amended Complaint; the first four of these paragraphs are realleged by reference in every one of the eight counts. New allegations concerning the collector road were added to ¶¶ 43 and 48 of the Fourth Amended Complaint, and are likewise realleged in every count.

If Counts IV and VI are not new, but are instead amended versions of old counts, then each is barred by the doctrine of res judicata, because the corresponding count of each in the Third Amended Complaint--Count VIII--was dismissed with prejudice. "[U]nder res judicata all issues that were or could have been raised in the action are concluded by the judgment whether raised or not."

appellants were] ordered to streamline [their] pleading and failed to do so . . . . " Id.{[11]} Accordingly, the involuntary dismissal of the action under Fla.R.Civ.P. 1.420(b) was proper, involved no abuse of discretion, and should be affirmed:

> "The trial judge having exercised his discretion, **and appellant having failed to demonstrate an abuse of that discretion**, the order of dismissal is hereby affirmed." Id. (Emphasis added.)

Likewise, in Dewitt v. Rossi, 559 So.2d 659 (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990), the appellate court upheld the trial court's dismissal

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Trawick's Florida Practice and Procedure (1994 ed.), § 25-13, p. 410, citing and paraphrasing Gordon v. Gordon, 59 So.2d 40 (Fla. 1952).

[11] Plaintiffs were ordered to streamline the causes of action that survived dismissal with prejudice. Accordingly the plaintiffs cannot successfully claim compliance with the trial court's order merely by pointing to their elimination of most of the counts that were dismissed with prejudice. What the Court ordered streamlined were the remaining counts ("the Plaintiffs' Fourth Amended Complaint shall replead the valid causes of action in compliance with Rule 1.110, Fla. R. Civ. P., which requires a concise, plain statement of facts," R 851), and it is the plaintiffs' failure to streamline those counts so as to comply with the 6-20-94 order of the court that justified the Rule 1.420(b) dismissal on 10-20-94.

with prejudice of the amended complaint for violation of Rule 1.110(b). Again, the same reasons that justified the dismissal in that case justified dismissal in this case:

"The trial court granted the motion on the basis that 'several paragraphs in the amended complaint contained multiple or narrative allegations, involving multiple sets of circumstances, making a cumbersome pleading difficult to respond to' . . . {[12]}

"On appeal, Dewitt poses the issue as being simply whether she stated a cause of action, however cumbersome, for breach of contract (against the Rossis) and contractual interference (against the Boehmes). The appellees, on the other hand, see the issue as being the right of the trial court to dismiss a complaint violative of the Rules of Civil

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[12] Likewise, the instant appellants are guilty of such cumbersome pleading, especially at ¶¶ 51, 8, 78, 86, and 123 of the Fourth Amended Complaint (R 912-913, 905, 918-919, 921, 929-930); and because the Fourth Amended Complaint substantially duplicates the relevant counts of the Third Amended Complaint, then just like the Third, the Fourth Amended Complaint is inevitably "inordinately long, complicated, and replete with conclusions, assumptions, and speculative statements of fact." 6-20-94 Order, R 850.

Procedure.

"We agree with the appellees. Under Rule 1.110(b), Florida Rules of Civil Procedure, a complaint is required to contain a short and plain statement of the grounds upon which the court's jurisdiction depends, and must also contain a short and plain statement of the ultimate facts showing that the pleader is entitled to relief . . .

"Rule 1.420(b) (involuntary dismissal) states that any party may move for dismissal of an action or of any claim against him for failure of an adverse party to comply with the Rules or any order of the court . . . In the instant case, we see no abuse of discretion by the trial court in requiring compliance with the rules of pleading and, after allowing the opportunity for amendment, granting dismissal . . . AFFIRMED." Dewitt, 559 So.2d at 659 (underlined emphasis added).

By substantially duplicating the counts instead of rewriting them so as to make them "concise" and "plain," as the court ordered, the appellants disobeyed the court's order, and violated Rule 1.110(b) as well. Under Rule 1.420(b) and the authorities cited above, the trial court properly dismissed the action with prejudice. Because it

cannot be said that "no reasonable man would take the view adopted by the trial court," the trial court did not abuse its discretion, Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). Therefore, the 10-20-94 order of dismissal should be affirmed.

5. Repleading Counts Dismissed with Prejudice. The trial court's 6-20-94 order dismissed Counts VIII and IX of the Third Amended Complaint with prejudice. R 851, ¶ 2. Such an order necessarily commanded that the appellants not waste the trial court's time, the taxpayers' money, and the appellees' time and money, by repleading those counts. Nevertheless, as found by the trial court in its 10-20-94 order, R 946, the appellants defied the court by repleading those counts as Counts IV, VI, and VIII of their Fourth Amended Complaint. Such defiance justified involuntary dismissal under Rule 1.420(b).{[13]}

So rare is such defiance that the appellees have

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[13] See Exceptions 3 and 6 to "Appellees' Response to Appellants' Statement of the Case and of the Facts," and footnote 10, above, analyzing alternative views of Counts IV and VI of the Fourth Amended Complaint as either entirely new counts invalidated by the doctrine of departure in pleading, or as old counts dismissed with prejudice and therefore improperly repleaded in amended form.

found no authority on point. However, the trial court has the inherent power to prevent frivolous litigation, and that court properly exercised that power below under Rule 1.420(b) to discourage refilings again and again of counts dismissed with prejudice.

6. The Condition on Which Various Counts of the Third Amended Complaint Were "Approved" Was Not Fulfilled; Therefore the Court Properly Dismissed the Entire Action under Rule 1.420(b). In the same 6-20-94 order in which the trial court declined to dismiss with prejudice five of the counts of the Third Amended Complaint, R 843, 844, the court also ordered that those counts be streamlined in accordance with Rule 1.110(b). 6-20-94 Order of Court, R 851.

There is no doubt that Florida's courts have authority to order such compliance with Rule 1.110. Lutheran Senior Citizens' Foundation, Inc. v. B.F. Schumacher, 355 So.2d 861 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 833 (Fla. 1978):

"Florida courts have long held that a plaintiff may be required to amend or recast a complaint, disposing of burdensome allegations. *L.C. Morris, Inc. v. Allison*, 277 So.2d 28 (Fla. 3d DCA 1973);

Cook v. Katiba, 152 So.2d 504 (Fla. 1st DCA 1963)." Lutheran at 863.

Interpreting the order in accordance with the presumption of correctness in which it is clothed in this Court, the "approval" of the five counts was conditioned on the appellants' compliance with the same order's insistence that they streamline those same counts per Rule 1.110. The appellants' failure to comply with this order authorized the Rule 1.420(b) dismissal which followed:

"In that appellant was ordered to streamline his pleading and failed to do so, the trial court, upon its discretion, had the authority to dismiss the . . . amended complaint. See Fla.R.Civ.P. 1.420(b) . . . the order of dismissal is hereby affirmed." Lutheran at 863 (citations omitted).

The appellants' citation of Beach Development Corp. v. Stimson, 159 So.2d 113 (Fla. 2d DCA 1964) is unavailing, because that case applies only to "rais[ing] objections to retained portions of an original pleading [only] when such objections were available and not urged or unsuccessfully urged on motion to the original pleading." Id. at 115. Beach Development has nothing to do with orders that, like the 6-20-94 order at bar, conditions approval of

counts upon their being streamlined.

7. The Test of *Beach Development* Was Itself Unmet. In addition, the appellants fail to meet Beach Development's condition that, in order to bar an objection, it must have been "available . . . on motion to the original pleading." Id. at 115. Here, the failure of the appellants to comply with the trial court's 6-20-94 order to streamline their complaint did not become available for objection until the appellants filed their Fourth Amended Complaint on 7-19-94. The city raised the appellants' noncompliance with the court's 6-20-94 streamlining order at its first opportunity, namely in its 9-2-94 "Rule 1.420(b) Motion for Involuntary Dismissal," R 940-942.

If the Court affirms on the basis of the arguments in the foregoing Part II, then it will not be necessary for the Court to consider the remaining arguments in this brief.

III. IN ITS 6-20-94 ORDER CONCERNING THE THIRD AMENDED COMPLAINT, THE TRIAL COURT PROPERLY DISMISSED WITH PREJUDICE COUNTS III, V, VII, VIII, IX, X, AND XI

8. Note: All References Hereafter to "the Complaint" Mean "the Third Amended Complaint," Unless Specified Otherwise.

9. The Trial Court Properly Dismissed with Prejudice Counts III, VII, VIII, IX, and XI, Because They Had All Previously Been Dismissed Twice, and Withdrawn Once. Generally, three failed attempts to state the same cause of action justify dismissal with prejudice. Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983), rev. denied, 447 So.2d 887 (Fla. 1984):

"Thus, even though the number of amendments is not determinative of whether there has been an abuse of the privilege to amend, it has been said that 'generally three ineffective attempts to state the same cause of action are enough.' Trawick, *Florida Practice and Procedure*, § 14-2 at 208 (1980 Edition). Furthermore, in the absence of an abuse of discretion, a trial court's dismissal with prejudice will not be disturbed." Id. at 1122.

Likewise, Florida Gas Company v. Arkla Air Conditioning Company, 260 So.2d 220 (Fla. 1st DCA 1972):

" 'Three strikes are out' in a baseball game; Florida

Gas has been at bat four times. Under the most liberal construction of our modern rules, we hold that ample opportunity has been proffered to appellant." Id. at 221.

Moreover,

" 'liberality in permitting amendments decreases as the action progresses and as the number of amended pleadings increases.' " Alvarez v. DeAguirre, 395 So.2d 213, 217 (Fla. 3d DCA 1981) (citation omitted).

In sum, as the Third District stated in Kohn v. City of Miami Beach, 611 So.2d 538 (Fla. 3d DCA 1992):

"While there is no magical number of amendments which are allowed, we have previously observed that with amendments beyond the third attempt, dismissal with prejudice is generally not an abuse of discretion. **There is simply a point in time when defendants are entitled to be relieved from the time, effort, energy, and expense of defending themselves against seemingly vexatious claims.**" Id. at 539 (emphasis added).

That point had been reached with regard to Counts III, VII, VIII, IX, and XI of the Third Amended Complaint, because they had all previously been

dismissed twice, and withdrawn once, and detailed in the footnote.{[14]}

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[14] Count III (R 294-299, seeking overthrow of the 1988 Development Agreement) was pleaded as Count IV of the Second Amended Complaint (R 157-160), and dismissed in the 8-9-93 Order (R 259-260, 264); and was also pleaded as Count II of the First Amended Complaint (R 103-106), and dismissed in the 2-19-93 Order (R 124-125, 127); and was also pleaded as Count II in the original Complaint (R 21-24), and was withdrawn (Initial Brief, p. 4, n. 3).

Count VII (R 308-310, claiming duress to void a contract) was pleaded as Counts II and VII of the Second Amended Complaint (R 153-154, 167-168), and dismissed in the 8-9-93 Order (R 258-259, 261, 264); and was also pleaded as Count I of the First Amended Complaint (R 89-91, 101-103), and dismissed in the 2-19-93 Order (R 123-124, 127); and was also pleaded as Count I in the original Complaint (R 8, 19-20), and was withdrawn (Initial Brief, p. 4, n. 3).

Count VIII (R 310-315, seeking damages for non-voiding of the 1988 Development Agreement) was pleaded as Count VIII of the Second Amended Complaint (R 168-172), and dismissed in the 8-9-93 Order (R 261-262, 264); and was also pleaded as civil theft in Count V of the First Amended Complaint (R 111-112), and dismissed in the 2-19-93 Order (R 123, 127); and was also pleaded as civil theft in Count V of the original Complaint (R 28-30), and was withdrawn (Initial Brief, p. 4, n. 3).

Count IX (R 316-320, alleging arbitrary and capricious land use designations) was pleaded as Count IX of the Second Amended Complaint (R 172-177), and dismissed in the 8-9-93 Order (R 262, 264); and was also pleaded as

10. The City's Motion to Dismiss the Third Amended Complaint Stayed Within the Four Corners of the Complaint and the Exhibits Attached Thereto, and under Rule 1.110(d) Properly Asserted an Affirmative Defense Appearing on the Face of that Complaint. The appellants claim that "[t]he City, in its Motion to Dismiss alleged numerous factual matters which are nowhere to be found in the record of this matter." Initial Brief, p. 13. This is frivolous and simply untrue. All matters raised in the motion to dismiss stayed within the four corners of the complaint and the exhibits attached thereto.

The appellants claim that the city made "unproven factual allegations that Duane Avenue and the collector road were not one and the same." Initial

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Count III of the First Amended Complaint (R 106-109), and dismissed in the 2-19-93 Order (R 125, 127); and was also pleaded as Count III in the original Complaint (R 24-26), and was withdrawn (Initial Brief, p. 4, n. 3).

Count XI (R 323-326, seeking damages for delay) was pleaded as Count X of the Second Amended Complaint (R 177-180), and dismissed in the 8-9-93 Order (R 262, 264); and was also pleaded as Count VII of the First Amended Complaint (R 115-118), and dismissed in the 2-19-93 Order (R 126, 127); and was also pleaded as Count VII in the original Complaint (R 33-35), and was withdrawn (Initial Brief, p. 4, n. 3).

Brief, p. 13. This reveals a basic misunderstanding. As shown in the following argument justifying the dismissal with prejudice of Count III, the city instead argued thus: that the appellants' allegation in their complaint--that the designation of Duane Avenue as a collector road was required by the 1988 Development Agreement, and that therefore its non-designation triggered the automatic termination thereof--was irrevocably repugnant to the Agreement itself, which was attached to the complaint as Exhibit G. Such an argument is plainly within the boundaries of the complaint and within the boundaries of the law governing motions to dismiss. E.g., Franz Tractor Co. v. J.I. Case Co., 566 So.2d 524 (Fla. 2d DCA 1990), in which this Court held:

> "Any exhibit attached to a pleading is a part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control and may be the basis of a motion to dismiss." Id. at 526.

In addition, as authorized by Fla. R. Civ. P. 1.110(d), the city properly asserted an affirmative defense appearing on the face of the complaint, namely, the statute of limitations. Anderson v. Emro

Marketing Co., 550 So.2d 531, 532 (Fla. 1st DCA 1989); Moucha v. Burger King Corp., 450 So.2d 335, 336 (Fla. 5th DCA 1984).

11. The Trial Court Properly Dismissed Count III of the Third Amended Complaint with Prejudice. Count III alleged in pertinent part that

"The designation of Duane Avenue as a collector road in the P.P.C. Plan . . . was a de jure and a de facto condition precedent of the Development Agreement . . . . " Complaint, ¶ 91.

"The P.P.C. . . . has refused . . . to designate Duane Avenue . . . as a collector road . . . ." Complaint, ¶ 153.

"The Development Agreement further provides that if the designation in the P.P.C. Plan is not obtained . . . the Agreement automatically terminates . . ." Complaint, ¶ 158.

The trial court correctly dismissed these claims and the remainder of Count III with prejudice. As correctly reasoned by the trial court,

"Count III of the Third Amended Complaint fails to state a cause of action for equitable relief based upon the original Development Agreement executed by the parties. Specifically, Count III contains four

(4) fatal repugnancies, one of which was disallowed by this Court's previous February, 1993 Order, and yet again, for a second time, by this Court's August 6, 1993 Order. [R 259-260, filed 8-9-93.]

"As was previously observed by this Court in its earlier Order Granting Motion to Dismiss Amended Complaint, and this Court's August 6, 1993 Order, Count III (Count IV of the Second Amended Complaint) 'demonstrates an impermissible inconsistency between the allegations contained therein and the written terms of the Development Agreement.' The impermissible inconsistency between the allegations contained in the Third Amended Complaint and the written terms of the Development Agreement not only remain, but are further amplified. In the Plaintiffs' Third Amended Complaint they have, for the first time, included the site plan exhibit which was originally attached to the 1988 Development Agreement. By including the missing exhibit to the 1988 contract the irrevocable nature of the fatal repugnancy is augmented. In particular, the inclusion of the Site Plan Exhibit to the 1988 Development Agreement reveals a proposed collector road running through the project. Nowhere is there any reference in the

Site Plan Exhibit to Duane Avenue. The Site Plan makes no reference whatsoever to Duane Avenue. It only refers to a generic and unnamed road, not even designated as a collector road, running through the Site Plan.

"The Plaintiffs' repeated disregard of this Court's previous two Orders alone require dismissal with prejudice, notwithstanding the three (3) further repugnancies contained in Count III of the Third Amended Complaint.

"This aside, the repugnancy between complaint and exhibit negates the cause of action and requires dismissal. See Franz Tractor Co. v. J.I. Case Co., 566 So.2d 524 (Fla. 2d DCA 1990), in which the court held:

'Any exhibit attached to a pleading is a part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control and may be the basis of a motion to dismiss.' Id. at 526.

"The First District Court of Appeal held likewise in Striton Properties v. The City of Jacksonville Beach, 533 So.2d 1174 (Fla. 1st DCA 1988).

"Since there is no provision in the 1988

Development Agreement, nor its exhibits, which requires as a condition precedent the designation of Duane Avenue as a collector road, Plaintiffs have failed to state a cause of action for termination of the 1988 Development Agreement as set out in Count III and its companion Count VIII of the Third Amended Complaint.

"In addition, a further impermissible inconsistency between the allegations contained in the Third Amended Complaint and the written terms of the Development Agreement exists in the present pleadings. The 1988 Development Agreement, at paragraph 6, provides for the automatic termination if 'the land use designations . . . contemplated by this agreement [are not] placed on the property.' The complaint then alleges that Duane Avenue was not designated as a collector road. A review of the 1988 Contract reveals that the term 'property' is defined in the contract to mean only the property owned by E. B. Rood and Keith R. Collen (and now Collen's successor, Bruce McLaughlin).{[15]}

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[15] *Appellees' Note:* EXHIBIT G to the Third Amended Complaint, p. 0897, Recital A, last sentence ("The said property owned by the Owners shall hereinafter be referred to as 'Property.' ")

Because Duane Avenue is not Plaintiffs' property, and because the termination provisions of the Development Agreement apply only to Plaintiffs' property, the refusal to designate Duane Avenue as a collector road by Pinellas County cannot trigger the termination provisions of the Development Agreement. In addition to the reasons set forth earlier, based upon this repugnancy, Counts III and VIII are dismissed with prejudice." 6-20-94 Order, R 844-846.

For these reasons, the trial court properly dismissed Count III of the Complaint with prejudice.

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space, but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss the complaint, R 443, at pages 6-10 thereof (R 448-452). {[16]}

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[16] On page 29 of their Initial Brief, the appellants claim that "[a]t issue is the City's admitted failure to attach the Comprehensive Plan to the Ordinance adopting the plan." (Emphasis added.) This is utterly false. No such "admission" exists within the four corners of the complaint or its exhibits. The Third Amended Complaint alleges only that "City Staff have expressed uncertainty as to the official

12. The Trial Court Properly Dismissed Count V of the Third Amended Complaint with Prejudice. Count V of the complaint alleged that "No Land Use Element of the Comprehensive Plan is attached to Ordinance 80-12," R 303, ¶ 186, and the appellants sought a declaratory judgment that Oldsmar's Comprehensive Plan was null and void ab initio. R 304. As demonstrated below, this count was properly dismissed with prejudice by the trial court.

11-A. After Thirteen Years of Public Acquiescence in the Substance of the Ordinance, Which All the While Guided the City's Development, Public Policy Forbade the Appellants' Attack on the Validity of the Ordinance Because of Alleged Procedural Irregularities. This is a well-established doctrine. Trainor v. City of Wheat Ridge, 697 P.2d 37 (Colo. 1st DCA 1984):

"In 1972, the City passed Ordinance 98 which repealed [an earlier zoning law] and enacted

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status, or lack thereof, of the document enforced as the Land Use Element of the Comprehensive Plan." Count V, ¶ 188, R 303. "[I]n ruling on such a motion [to dismiss] we are confined to a consideration of the allegations found within the four corners of the complaint." Cook v. Sheriff of Collier County, 573 So.2d 406, 408 (Fla. 2d DCA 1991).

'comprehensive zoning regulations' for the City . . . In March 1982 plaintiffs again applied to the City to rezone their property from A-1 to C-1, which request the Planning Commission again denied. Shortly thereafter, . . . plaintiffs commenced this action seeking a declaratory judgment that the property is zoned C-1 . . .

"[Plaintiffs] challenged the adequacy of the procedures followed in its enactment . . . However, after long public acquiescence in the substance of an ordinance, public policy does not permit such an attack on the validity of the ordinance because of procedural irregularities. *Edel v. Filer Township*, 49 Mich.App. 210, 211 N.W.2d 547 (1973); *Taylor v. Schlemmer*, 353 Mo. 687, 183 S.W.2d 913 (1944); *Struyk v. Samuel Braen's Sons*, 17 N.J. Super. 1, 85 A.2d 279 (1951); see also *Fifth Church of Christ v. Pigg & Son, Inc.*, 109 Colo. 103, 122 P.2d 887 (1942); I A. Rathkopf & D. Rathkopf, *Law of Zoning & Planning* § 10.14 (4th ed. 1984); I R. Anderson, *American Law of Zoning* § 4.08 (2d ed. 1976).

"Ordinance 98 had been in effect, guiding the City's development, for over 10 years before plaintiffs' complaint. Thus, there had been

extensive public reliance on the ordinance, thereby immunizing it from belated attack on the various procedural grounds which are asserted. *Edel v. Filer Township*, supra; *Benequit v. Borough of Monmouth Beach*, 125 N.J.L. 65, 13 A.2d 847 (1940); *Ninth Street Improvement Co. v. Ocean City*, 90 N.J.L. 106, 100 A. 568 (1917). **Therefore, the trial court was correct in dismissing the complaint."** Trainor at 38-39 (emphasis added).

The appellants cited below the case of Bal Harbour Village v. State ex rel. Giblin, 299 So.2d 611 (Fla. 3d DCA 1974), cert. denied, 311 So.2d 670 (Fla. 1975), in an attempt to overcome the foregoing Trainor case and the authorities cited therein. Bal Harbour is irrelevant because its invalidation of the ordinance therein was based on that city's failure to follow a Florida statute requiring publication of notice, which "is jurisdictional and cannot be waived." Id. at 616. The instant plaintiffs have failed to allege that the city violated any Florida statute whatsoever, or any jurisdictional, unwaivable requirement.

For the reasons set forth above, the trial court properly dismissed Count V with prejudice.

11-B. Count V Was Properly Dismissed With Prejudice Because It Introduced New Issues or Materially Varied the Grounds of Relief. Count V pleaded a new cause of action different than that pleaded in any of the three previous complaints. **Indeed, the appellants admitted below that "Counts V and X of the Third Amended Complaint . . . do 'Introduce New Grounds or Materially Vary the Grounds of Relief.' "** Appellants' 3-28-94 "Motion to Strike 'Defendant's Supplementary Memorandum,' Filed March 18, 1994 and Initial Memorandum of Law," R 889, 890, ¶ 3 (emphasis added). Given this admission, and under the authorities cited below, the trial court properly dismissed Count V (and its companion, Count X) with prejudice.

This new count (Count V) required proof of some different essential facts than are required by any of the other actions set forth in the previous complaints. Specifically, and assuming arguendo that Count V stated a cause of action, then in order to prevail, the appellants would have had to introduce evidence that the Land Use Element was unattached to Ordinance 80-12 at the time of its passage.

Such evidence is utterly irrelevant to each and

every other count alleged in all of the appellants' prior complaints. Consequently Count V presented a cause of action different than prior ones, and also presented new issues and varied grounds for relief. Accordingly, under the doctrine of "departure in pleading," it was improper for the appellants to plead it, and therefore Count V was properly dismissed with prejudice. Warfield v. Drawdy, 41 So.2d 877 (Fla. 1949); Cox v. Seaboard Coast Line Railroad Co., 360 So.2d 8 (Fla. 2d DCA 1978), cert. denied, 367 So.2d 1123 (Fla. 1979); Dunn v. Campbell, 166 So.2d 217, 217-219 (Fla. 2d DCA 1964); Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA 1984), rev. denied, 484 So.2d 7 (Fla. 1986):

"[B]ecause Bondu's proffered amendment to her original action (a) sets forth a cause of action (b) which is different from the counts in her earlier action, the order denying her leave to amend must be affirmed.

"[I]f the proffered amendment pleads a cause of action different than that pleaded in the [prior] complaint, the rule authorizing amendments does not apply." Bondu at 1310, and 1310, n. 2 (emphasis added).

The other cases cited above are quoted in pertinent

part in the city's 3-18-95 supplementary memorandum, R 805, at pages 17-19 thereof (R 821-823).

For all of these reasons, the trial court properly dismissed Count V prejudice.{[17]}

11-C. Count V Was Properly Dismissed With Prejudice Because of the Statute of Limitations. The sole ground on which the trial court dismissed this count was the time-bar of the statute of limitations:

> "Section 95.11(3)(p), Florida Statutes, requires that '[a]ny action not specifically provided for in these statutes' must be commenced within four (4) years. The complaint reveals that the ordinance under attack was adopted over 13 years ago, in December 1980. Accordingly, Counts V and X of the Third Amended Complaint are time-barred and must be dismissed with prejudice." 6-20-94 Order, R 846-847

This holding is correct, for the following reasons.

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[17] The appellants contend that they had been given leave of court to plead Count V and its companion, Count X. No such order giving such leave is in the record on appeal, and therefore no such order is before this Court. Even if it were, nevertheless prior leave would not immunize the counts from the cited binding precedents of the Supreme Court and of this Court.

The appellants admit that Rood and McLaughlin's predecessor Collen bought their properties in 1982. Complaint, ¶¶ 21-22, R 269. They admit that beginning in 1985, Rood applied for the issuance of site development approvals and building permits for a shopping center in accordance with the superseded 1972 Zoning Ordinance. Complaint, ¶¶ 34-35, R 271. They admit that Collen contemporaneously "made enquiries of the City with respect to the development of the property in accordance with OLDSMAR's [superseded] Zoning Ordinance." Complaint, ¶ 37, R 272. They admit that "Rood's application . . . was denied by OLDSMAR because the proposed use was inconsistent with the Comprehensive Plan designation of Urban Low Density Residential." Complaint, ¶ 36, R 272. They admit that this denial occurred before the execution by Rood of a contract whereby he reserved sewage capacity for his property, on 7-1-86. Complaint, ¶¶ 51-54, R 10-11. Thus, Rood knew that the Comprehensive Plan made impossible the extensive development of his property that he desired, and he knew this no later than 7-1-86. Using this as the date that Rood became chargeable with knowledge of the alleged procedural infirmity in the passage of

the Comprehensive Plan, then under § 95.11(3)(p), Fla. Stat. (1985), he had four years to file a suit attacking the passage of that plan--that is, until 7-1-90. However, the suit was not filed until 8-26-93, as Counts V and X of the complaint, R 303, 321. Thus it is time-barred as to Rood. Doe v. Cutter Biological, 813 F. Supp. 1547 (M.D. Fla. 1993), affirmed, 16 F.3d 1231 (11th Cir. 1994) (construing Florida law):

"Florida law does not require that Plaintiff know the full extent of his injury. Plaintiff need only have notice of the possible invasion of his legal rights. University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991). By October 1985, Plaintiff knew that he was HIV positive and thus, that he had suffered an injury; *and* Plaintiff knew that he was HIV positive as a result of being treated with HIV-contaminated factor concentrate. [Likewise--as alleged within the four corners of the complaint and the exhibits--by July 1986 Rood knew that he would not be allowed to develop his land as he wished; and he knew that the city was relying on the Comprehensive Plan as legal authority to block his wishes.] The fact that Plaintiff did not test positive for AIDS until 1990 [and the fact that

Reed did not discover the alleged nonattachment of the Comprehensive Plan to the ordinance until 1993] is not dispositive because under Florida law, the statute of limitations begins to run even if the full consequences of the injury are not known. *Byington v. A.H. Robins Co., Inc.*, 580 F. Supp. 1513 (S.D. Fla. 1984); *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954)." Doe at 1555 (emphasis of "not" is added; emphasis of "and" is in original).

Nor is the doctrine of equitable tolling available to the appellants. Armbrister v. Roland International Corp., 667 F. Supp. 802 (M.D. Fla. 1987) (construing Florida law):

"In order to benefit from the doctrine of equitable tolling, Plaintiffs must show: first, that they failed to discover and *could not* have discovered, the facts underlying their claim before the applicable statute ran, and second, that this was so because Defendants prevented Plaintiffs from discovering the facts by 'fraudulent means.' See *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338 (5th Cir. 1971); *Nardone v. Reynolds*, 333 So.2d 25 (Fla. 1976); *Sellers v. A.H. Robins Co.*, 715 F.2d 1559 (11th Cir. 1983). Plaintiffs have failed to establish either requirement." Id. at 810 (emphasis original).

Having been hired by Rood to negotiate with the city concerning the Comprehensive Plan's prohibition of the development that Rood wanted, Complaint, ¶ 38, and EXHIBIT E thereto, McLaughlin likewise learned of the injury caused by the Plan, and no later than June 13, 1986, the date of EXHIBIT E of the complaint. That exhibit consists of a 6-13-86 letter signed by McLaughlin and complaining of "the present conflict between the City's Comprehensive Land Use Plan and its [superseded] Zoning Ordinance," and of the recommended "denial of Mr. Rood's requests to amend the plan." EXHIBIT E, p. 1. Moreover, as admitted successor to Collen (¶ 104 of complaint) and therefore as a joint venturer with Rood, McLaughlin became bound by Rood's failure to file suit.{[18]} Complaint, ¶¶ 60 and 65; 1988

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[18] The relation of joint venturers "is governed by partnership law." Drew v. Hobbs, 140 So. 211, 212 (Fla. 1932). This includes statutory partnership law. Campbell v. A.B. Taff & Sons, Inc., 519 So.2d 1039, 1041 (Fla. 1st DCA 1988). Therefore, § 620.60(1), Fla. Stat. (1991), which is part of the Uniform Partnership Act, is binding in this case. As does Hobbs, § 620.60(1) makes Rood's failure to sue timely binding on the entire joint venture:

> "The act of every partner . . . binds the partnership . . . ." § 620.60(1), Fla. Stat. (1991).

Development Agreement, EXHIBIT G:

"E. The Property will be treated as a unified development for the purpose of this Development Agreement. The parties agree that for all purposes of review for development approvals, for the provision of all of the City services, for the review of rezoning requests, land use plan amendment requests, site plan reviews and for all other purposes, the property shall be deemed one unified parcel of land even though the Property consists of two separate ownerships. . . Any reference in this Agreement to the Owners contemplates E.B. Rood and Keith R. Collen or their successors in interest . . . ." 1988 Development Agreement, EXHIBIT G, pages 0898 and 0911 (emphasis added).

Even if the four-year statute of limitations is measured from the date of this Agreement--February 4, 1988, EXHIBIT G, p. 0897--then the deadline was February 4, 1992. The appellants' attack on the ordinance was not filed until over a year later, on

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Likewise, § 620.64, Fla. Stat. (1991):

> **"Liability of incoming partner.**--A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when the obligations were incurred . . . ."

August 27, 1993, as Counts V and X of the complaint. R 303, 321.

11-D. Conclusion as to Count V. A trial court's judgment will be upheld on any appropriate legal or equitable theory, even if not argued below. Springfield v. Department of Environmental Protection, 648 So.2d 802 (Fla. 1st DCA 1994):

" 'the law is so well settled as to require no citation of authority to the effect that a correct result or judgment, though based on an erroneous reason or rule, requires affirmance on appeal. In other words, it is the final conclusion or judgment which counts and not the reasons therefor.' *Jones v. Dove*, 300 So.2d 758, 758-59 (Fla. 1st DCA 1974) (on rehearing); *accord, e.g., Stuart v. State*, 360 So.2d 406 (Fla.1978); *Robinson v. State*, 393 So.2d 33 (Fla. 1st DCA 1981)." Id. at 804.

Moreover, the city did argue to the trial court the theories of public policy and departure in pleading set forth in parts 11-A and 11-B, above, in its 3-18-95 "Defendant City of Oldsmar's Supplementary Memorandum in Support of Its Motion to Dismiss Counts II, V, X, and XII of the Third Amended Complaint," R 821-824. The theory of joint venture was generally argued below, albeit not in connection

with Count V, in the city's 10-13-93 motion and memorandum to dismiss the complaint, R 443, 469-482.

For all of the foregoing reasons, the trial court properly dismissed Count V with prejudice.

13. Count VI, Which Was Dismissed **Without** Prejudice, Is Not on Appeal. On page 22 of their Initial Brief, the appellants argue error in the dismissal without prejudice of Count VI, which sought rescission of a contract for purchase of sewage capacity, attached to the complaint as EXHIBIT F. R 305-307.

This count is not on appeal. It is not listed in either the Notice of Appeal, R 861, nor in the corresponding Statement of Judicial Acts to be Reviewed, R 876. Moreover, a dismissal without prejudice is not a final order subject to review. Augustin v. Blount, Inc., 573 So.2d 104, 105 (Fla. 1st DCA 1991).

If the Court disagrees, then the appellees respectfully rely on the arguments as to this count set forth in the city's 10-13-93 motion and memorandum to dismiss the complaint, R 443, 453-463.

14. The Trial Court Properly Dismissed Count VII

of the Third Amended Complaint with Prejudice. Count VII sought rescission of the sewage capacity contract (Complaint, EXHIBIT F), on grounds that Rood executed it under duress. R 308-310. As the trial court held and quoted,

" 'It must be shown (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side.' City of Miami v. Kory, 394 So.2d 494, 497 (Fla. 3d DCA), rev. denied, 407 So.2d 1104 (Fla. 1981)." 6-20-94 Order, R 847.

Because nothing alleged in this count rose to the level of duress, it was properly dismissed with prejudice.

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space, but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss, R 443, at pages 22-26 thereof (R 464-468).

15. Count VIII, Being the Damages Counterpart to Count III, Was Properly Dismissed with Prejudice for the Same Reasons that Count III Was So

Dismissed. Accordingly, the appellees rely on the reasons set forth above as to Count III to support the dismissal with prejudice of Count VIII.

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space, but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss, R 443, at pages 26-41 thereof (R 468-483).

16. The Trial Court Properly Dismissed Count IX of the Third Amended Complaint with Prejudice. The city adopts for its argument here the reasoning of the trial court as to this count, found in the court's 6-20-94 Order at R 848-850.

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space, but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss, R 443, at pages 41-60 thereof (R 483-502).

17. Count X, Being the Damages Counterpart to Count V, Was Properly Dismissed with Prejudice for the Same Reasons that Count V Was So Dismissed.

Accordingly, the appellees rely on the reasons set forth above as to COUNT V to support the dismissal with prejudice of Count X.

18. The Trial Court Properly Dismissed Count XI of the Third Amended Complaint with Prejudice. Count XI sought to state a taking cause of action under 42 U.S.C. § 1983, based on what the appellants called "causing delays by refusing to approve a reasonable use of Plaintiffs' property . . . ." Complaint, ¶ 280, R 323. Although the appellants claimed that the city refused to approve "any reasonable development proposal" and so "took . . . all economically beneficial use of Plaintiffs' property," Complaint, ¶ 282, R 323-324, they contradicted themselves by conceding that a marketable site plan was approved in the 1988 contract. Complaint, ¶ 102, R 285. This repugnancy within the count negated the cause of action and required dismissal. Peacock v. General Motors Acceptance Corporation, 432 So.2d 142 (Fla. 1st DCA 1983):

> "We affirm the dismissal of the . . . second count . . . Contradictory allegations within a single count neutralize each other and render the count insufficient on its face." Id. at 146.

Appellants asserted below that the marketable site plan no longer exists because it is contingent on the 1988 Contract, which they claim "automatically terminated." However, appellants cite no ordinance or resolution or contractual provision or any other authority to show that the marketable site plan cannot stand without the 1988 Contract.

In addition, as found by the trial court, the appellants failed to allege any proper basis for jurisdiction for this § 1983 claim. They are required to give "a short and plain statement of the grounds upon which the court's jurisdiction depends." Fla.R.Civ.P. 1.110(b)(1) (emphasis added). Instead, they alleged only conclusions of law, e.g., that "[t]his court has concurrent jurisdiction with the United States District Court under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 pursuant to *Howlett v. Rose*, 110 S.Ct. 2430 (1990)." Neither this nor anything else in this count constitutes a statement of grounds--facts showing jurisdiction--supporting jurisdiction over this count. Fayson v. Fayson, 482 So.2d 523, 525 (Fla. 5th DCA 1986).

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space,

but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss, R 443, at pages 61-80 thereof (R 503-522).

CONCLUSION

For all of the foregoing reasons, the 10-20-94 Order involuntarily dismissing the action under Rule 1.420(b) should be affirmed. Affirmance of that order would moot the appeal of the 6-20-94 Order, which dismisses with prejudice seven of the twelve counts of the Third Amended Complaint.

Alternatively, the 6-20-94 Order should be affirmed.

Respectfully submitted,

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Attorney for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by first class U.S. Mail to E. B. Rood, Esquire, 200 N. Pierce Street, Tampa, Florida 33602; to R. Bruce McLaughlin, 900 Gulf Blvd., #303, Indian Rocks Beach, Florida 34635; and to Eric Ager, 3375 Hunt Club Drive, Clearwater, Florida 34621, this 1st day of June, 1995.

_____

Attorney

IN THE COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

E. B. ROOD and R. BRUCE McLAUGHLIN,

Appellants,

v.

Case No. 94-02479
Lower Tribunal
Case 92-3764

THE CITY OF OLDSMAR,

Appellee.

_____/

APPELLANTS' MOTION FOR CLARIFICATION AND RECONSIDERATION

COME NOW Appellants, E. B. Rood and R. Bruce McLaughlin, *pro se*, pursuant to Rule 9.330, Fla.R.App.P., and move for clarification and reconsideration of the Order of the Court entered on April 12, 1996, and as grounds wherefore would show:

I. AS TO COUNTS I AND V OF THE FOURTH AMENDED COMPLAINT

1. The Court reinstated Count I of the Fourth Amended Complaint, which count sought a Declaratory Judgment that Oldsmar had unlawfully

amended an Ordinance by a resolution and further sought an injunction against the enforcement of the resolution.

2. Appellants also sought a refund of funds paid to the City pursuant to that resolution, so that they would have the complete remedy mandated by Florida law: *Thomas v. Gilbe, Inc.*, 104 So.2d 397 (Fla. 2d DCA 1958). [1]

3. Plaintiffs initially sought injunctive relief for the refund of fees, (R at 20). However, the trial court decided (R at 258) (dealing with what was then Count II of the complaint,) that Appellants should plead for recision of contract in order to obtain the funds paid to the City under the unlawful resolution.

4. In adjudicating the Third Amended Complaint, (R at 847,) the Trial Court dismissed the action for recision of contract **without prejudice**. As this Court pointed out during oral argument, it is not difficult to plead for recision of contract, (and Appellants in their Initial Brief showed how closely

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[1] Because the City asserted that Appellants were not entitled to **both** a Declaratory Judgment and Injunctive Relief, (*e.g.* R at 450,) and to damages (*e.g.* R at 502), Appellants were forced to plead the Declaratory Judgment and Injunction actions in counts separate from the damage counts.

they had tracked Professor Trawick's form in this count).

5. In the Fourth Amended Complaint, Count V sought recision of contract, in accordance with the order of the trial court stating that this was the proper cause of action, and in accordance with Professor Trawick's form, thereby curing the alleged defects in this Count found in the Third Amended Complaint.

6. Since

a) Appellants are entitled to monetary relief accompanying their Declaratory Judgment action, *Thomas, supra*;

b) Appellants followed the direction of the trial court in pleading this action as a complaint for recision of contract;

c) this Count was dismissed without prejudice in the Third Amended Complaint;

d) this count was repled in the Fourth Amended Complaint in strict compliance with Professor Trawick's outline; and

e) the Declaratory Judgment action, alone, leaves Appellants in the position where

the Resolution of the City of Oldsmar may be invalidated, but Appellants will be without means to recoup the $715,000.00 (seven hundred and fifteen thousand dollars,) paid to the City pursuant to that Resolution.

Count V of the Fourth Amended Complaint, seeking recision of contract as the companion damage action to Count I, reinstated by this Court, should also be reinstated.

II. AS TO COUNT III OF THE FOURTH AMENDED COMPLAINT AND COUNT IX OF THE THIRD AMENDED COMPLAINT

7. This Court reinstated Count III of the Fourth Amended Complaint, seeking a Declaratory Judgment that the City's Comprehensive Plan designations unlawfully mimicked those of the Pinellas County Planning Council and were arbitrary and capricious as applied to Appellants' properties.

8. The monetary damages flowing from this mimicking and arbitrary and capricious action were sought in Count IX of the Third Amended Complaint. (R at 317).

9. Since Appellants are entitled to monetary

relief as well as a Declaratory Judgment, (*Thomas, supra*,) and since this Court has reinstated the Declaratory Judgment action, the monetary damages action, (Count IX of the Third Amended Complaint,) should also be reinstated.

III. AS TO COUNTS IV AND THE FIRST COUNT NUMBERED "VI" [2] OF THE FOURTH AMENDED COMPLAINT

10. Appellants confessed error in including in the Fourth Amended Complaint, without leave of the trial court, Count IV seeking a Declaratory Judgment that the Development Agreement had been terminated by the passage of time, and the passage of time damage count (Count VI).

11. These two counts did not ripen (including the requisite pursuit of administrative remedies,) until just before the filing of the Fourth Amended Complaint.

12. Accordingly, Appellants urge this Court to affirm the dismissal of Count IV and the passage of

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[2] Unfortunately the Fourth Amended Complaint includes two counts numbered as "VI", the first alleging a Refusal to Terminate Development Agreement and Refund Fees, based on the passage of time, (hereinafter "the passage of time damage count",) and the second alleging Slander of Title, (hereinafter the "slander of title count").

time damage count of the Fourth Amended Complaint, **without prejudice** to a Motion for Leave to Amend and their subsequent incorporation in the Complaint to be adjudicated.

IV. AS TO THE COUNTS NUMBERED "VI" IN THE FOURTH AMENDED COMPLAINT

13. For the reasons set forth in Part III, *supra*, Appellants request clarification from this Court that this Court intended to reinstate the slander of title count, approved by the trial court as Count XII in the Third Amended Complaint, (R at 851), as the Count VI reinstated by this Court. (The slander of title count is also **part** of the monetary damage count coinciding with the Declaratory Judgment action reinstated by this Court in Count II of the Fourth Amended Complaint.)

V. AS TO COUNTS III and VIII OF THE THIRD AMENDED COMPLAINT

14. Count III of the Third Amended Complaint, (dismissed with prejudice, R at 851) sought a Declaratory Judgment that the original Development Agreement had automatically terminated because Pinellas County refused to permit the extension of a collector road known as Duane Avenue through Rood's property. Count VIII of the Third Amended

Complaint was the damage action seeking a refund of monies paid to the City by Appellants pursuant to the Development Agreement.

15. These counts were dismissed by the trial court because of alleged repugnancies between the complaint and the Exhibits thereto.

16. In particular, Appellants pled, (R at 313,) that the construction of Duane Avenue through Rood's property was a condition precedent of the Development Agreement. Although the Development Agreement does not make this statement in so many words, there is ample support for it, as follows:

a) See R at 853 - 854, listing other portions of the Development Agreement which imply this requirement; and

b) In a Petition to the Florida Department of Community Affairs, the City also pled that the construction of Duane Avenue through Rood's property was a condition precedent **(the exact same words used by Appellants,)** of the Development Agreement, (R at 277, ¶

6; and especially R at 380, ¶ 24). [3] This admission is binding on the City: *Curr V. Helene Transportation Co.*, 287 So.2d 695 (3d DCA 1974) and *Purgess v. Sharrock*, 33 F.3d 134 (2d Cir. 1994).

17. Since the lower Court specifically found that the construction of Duane Avenue through Rood's property was not a condition precedent to Development Agreement (R at 124) when the City had previously admitted that it was (R at 380, p. 24,) the dismissal of these Counts based on an alleged repugnancy was in error.

18. Further, the question of whether Rood was required to extend Duane Avenue through his property as a condition precedent of the Development Agreement was a question of fact which should not have been resolved in a Motion to

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[3] The Petition to the Department of Community Affairs, as it appears in the record, is incomplete and unsigned. However, counsel for the City stipulated to the trial court that a complete petition was prepared and filed, and that counsel for the City did sign the petition, including the allegation that the construction of Duane Avenue through Rood's property was a **condition precedent** of the Development Agreement.

Dismiss: *Guritz v. American Motivate, Inc.*, 386 So.2d 60 (Fla. 2d DCA 1980).

19. Nonetheless, the Trial Court adjudicated this matter based on a factual determination of alleged repugnancies between the Complaint and Exhibit (R at 259 - 260).

20. Since the City is bound by the previous admission of its counsel, and since the lower Court adjudicated facts in the context of a Motion to Dismiss, Counts III and VIII of the Third Amended Complaint should be reinstated.

WHEREFORE, Appellants respectfully move this Honorable Court to clarify and reconsider its Order of April 12, 1996, [4] by:

1. Reinstating Count V of the Fourth Amended Complaint as the damage count corresponding to Count I, already reinstated;
2. Dismissing Counts IV and VI (the passage of time counts) of the Fourth Amended Complaint, **without prejudice** to a Motion for Leave to Amend before the Trial Court;

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[4] Appellants do not seek reconsideration of the Order with respect to Count VII of the Fourth Amended Complaint, or with respect to Counts V, VII, X, and XI of the Third Amended Complaint.

3. Reinstating Count IX of the Third Amended Complaint as the count seeking monetary damages as a companion to Count III of the Fourth Amended Complaint, now reinstated by this Court;
4. Reinstating Counts III and VIII of the Third Amended Complaint.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing has been furnished by regular United States Mail to Bryan Kutchins, Esq., P.O. Box 1063, 584, Oldsmar, Fl., 34677, and to Eric Ager, 3375 Hunt Club Drive, Clearwater, Fl., 34621, this the ____ day of April, 1996.

_____

E. B. Rood

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